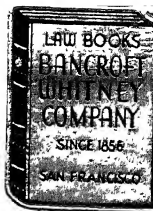


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PROOF OF SPECIFIC MATTERS

PART III

TRIAL STRATEGY

PART IV

ILLUSTRATIVE TRIAL

PART V

TRIAL TACTICS

GENERAL INDEX

TRIAL GUIDE

BY

SYDNEY C. SCHWEITZER

OF THE NEW YORK BAR

Author of

"TRIAL MANUAL FOR NEGLIGENCE ACTIONS"
"PREPARATION MANUAL FOR ACCIDENT CASES"
ETC.

VOLUME ONE

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PREFACE

It is the aim of this work to present a concise and practical guide to the trial of a civil action. The first part of the work is devoted to trial procedure in specific actions; the proceedings selected for discussion are believed those most representative of the more frequently encountered litigation. It is not intended to encompass the entire field of trial procedure, but as a practical guide for the average practicing attorney, this phase of the text will prove helpful.

The second part of the work is devoted to a discussion of proof of specific matters, and wherever possible the text has included practical suggestions not found in the reported decisions or books on the subject. The portions of the set devoted to trial strategy are intended to serve as working guides for the attorney about to conduct the trial of a civil lawsuit.

The suggestions made are by no means conclusive of the subject matter under discussion, whether it be the trial of a specific action or proof of a specific matter, as each case will present its own peculiar pattern of proof, and unique problem of trial strategy. Similarly, the lines of inquiry suggested for preparation of a lawsuit are not conclusive of the steps that should be taken in preparing a case for trial. But as a workable and concise guide to the trial of lawsuits generally, it is believed that this text will serve a useful purpose.

Grateful acknowledgment is made of the invaluable assistance rendered the author by Hazel Smith, Eleanor Schlaerth, and my partner, Ralph Saft, of the New York Bar, in the preparation and editing of the manuscript.

April 8th, 1945

SYDNEY C. SCHWEITZER

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PART I

TRIAL OF SPECIFIC ACTIONS

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PART I

TRIAL OF SPECIFIC ACTIONS

ABANDONMENT, PROOF OF

(Action involving abandonment of common law right to literary property)

Q—Did you, sometime during 1942, write a book entitled “The History of Evolution?”

Q—Who published this book?

Q—Do you recall the exact date of publication?

Q—I show you a book and ask if this is the work to which you have just referred?

(Marked in evidence as plaintiff’s exhibit.)

Q—Was this work based in part upon a book entitled “The Essentials of Evolution?”

Q—To what extent did you rely upon this work in writing your own book?

Q—Where did you first see this work?

Q—And what was that date?

Q—Do you know whether that book was copyrighted at that time? A—No, it was not copyrighted.

Q—Are you acquainted with the author of that book?

Q—And that author is the plaintiff in this action?

Q—What conversations did you have with the plaintiff, prior to the publication of your book, respecting the use of his own work?

Q—Please fix the time and place of these conversations.

Q—Who was present at that time?

Q—Did you, at any time before publication of your book, see the plaintiff’s work exhibited in public?

Q—Describe these occasions in detail.

Q—Did you ever hear the plaintiff discuss or quote from his book?

Q—Describe these occasions in detail.

(The proof should make clear all facts and circumstances in-
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dicative of an intent on the part of the owner of the common law copyright to abandon the same; as by a public utterance from the book, or a publication of the same to the general public.)

A party seeking to establish an abandonment should keep clear in mind the differences between an abandonment and other modes of divestiture of title or possession. A wide variety of tests have been suggested in this connection; although the most practical criterion is that which tests the continuity of possession, and the finality or irrevocability of the transfer made. A sale or gift is obviously made pursuant to a definite and well-recognized method of transfer, clearly distinguishable in its essential characteristics from an abandonment.

Thus, if a person loses an article of personal property, and the same is found by another, there cannot be said to be an acquisition of possession by virtue of an abandonment, since the finder only acquires a qualified right to possession. He holds the property against the entire world, except the loser or true owner of the article. But if the owner had thrown the article away, with no expectation of its return, the finder would have acquired full and complete title upon proof of the abandonment. *Foster v. Fidelity Safe Deposit Co.* 264 Mo 89, 174 SW 376, LRA1916A 655, Ann Cas 1917D 798; *Wyman v. Hurlburt*, 12 Ohio 81, 40 Am Dec 461; *Talley v. Drumheller*, 143 Va 439, 130 SE 385.

An abandonment may be defined as the intentional or deliberate relinquishment of a right, or property, or an interest in property. The significant characteristic of an abandonment is that it is made without reference to a particular person, or for a specific purpose. Thus, where the defendant is able to show that an alleged abandonment was consummated under circumstances indicating retention of a partial right or interest in the subject matter, or some hope of return in the future, the court will deny the existence of an abandonment cognizable at law. *Mallet v. Uncle Sam Gold & M. Co.* 1 Nev 188, 90 Am Dec 484; *St. Peters Church v. Bragaw*, 144 NC 126, 56 SE 688, 10 LRA(NS) 633; *Dober v. Ukase Invest. Co.* 139 Or 626, 10 P(2d) 356; Annotation 135 Am St Rep 890.

An affirmative course of conduct sufficient to establish an abandonment is evident in the abandoning by a railroad of

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its right of way over a part of its road, accompanied by the removal of tracks, ties, rails and bridges. *Norton v. Duluth Transfer Co.* 129 Minn 126, 151 NW 907.

The mode in which title to the property was originally acquired is not a determinative factor in evaluating an abandonment. Thus, one who acquires title to real property by prescription is not thereby rendered more susceptible to an allegation of abandonment subsequent thereto. 1 Am Jur p 5, § 6.

An author may abandon his rights in literary property by a publication of the same, without first securing a copyright. Publication under these circumstances ends the common law right, so that anyone may thereafter make use of the writings composed by the author. It is clear that statutory copyright, and the common law right, cannot exist at the same time. *Jewelers Mercantile Agency v. Jewelers Weekly Pub. Co.* 155 NY 241, 49 NE 872, 41 LRA 846.

The proof should be directed to the element of intent, which remains the controlling factor. All acts indicative of such intent should be fully explored, and all surrounding circumstances explanatory thereof established in detail. Are there any writings, such as letters, documents or public notices, which indicate an intention to relinquish full title and control of the property involved? What oral statements may be shown to support a similar intent? Do the surrounding circumstances evidence any act on the part of the original owner that would show he intended to forever part with control and title?

Too much importance should not be attached to the element of time. It may be that what purports to be an abandonment is only aided in this respect by the lapse of time between the divestiture of possession and the acquisition of same by the party claiming title. The element of nonuser and lapse of time, standing alone, is not sufficient to show an abandonment; but such factors are, of course, helpful where coupled with extraneous circumstances otherwise showing the elements of an abandonment. *Moon v. Rollins*, 36 Cal 333, 95 Am Dec 181; *Norton v. Duluth Transfer Co.* 129 Minn 126, 151 NW 907, *Ann Cas* 1916E 760; *Welsh v. Taylor*, 134 NY 450, 31 NE 896, 18 LRA 535; *Kiser v. Logan County*, 85 Ohio St 129, 97 NE 52, 39 LRA(NS) 1029; *Phy v. Hatfield*, 122 Tenn 694, 126 SW 105, 135 Am St Rep 888, 19 Ann Cas 374.

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It is clear, for example, that an abandonment may more readily be established where there has been a long lapse of time than where a short period is shown to have passed between the transfer of possession between the parties involved.

Mere temporary absence is not sufficient to establish an abandonment. Thus, where a party carelessly leaves an object in a public place, and forgets to call for the same until a few days later, it is clear that the characteristics of an abandonment do not exist. *Chapman v. Chapman*, 91 Va 397, 21 SE 813, 50 Am St Rep 846.

Counsel should examine any pertinent statutes, for in some states the legislatures have provided for a legal presumption of an abandonment after a specified period of time.

A few jurisdictions provide for the transfer to the state treasurer of bank deposits accumulated in an account and left untouched for a specified period of time. Thus, in *Comm. v. Dollar Sav. Bank*, 259 Pa 138, 102 Atl 569, 1 ALR 1048, the court stated: "The act before us does not, in so many words, say that a savings fund deposit which for thirty years has been entirely neglected by its owner shall be presumed to have been abandoned, but it is plain that such is the theory upon which the legislation rests."

The party asserting an abandonment has the burden of proving the same. The law creates no presumption that acts of a prescribed character do, or do not, amount to an abandonment; except in the few cases where statutes apply, as for example, in the instance of bank accounts allowed to remain dormant for a long period of time. *Foulke v. New York Consol. R. Co.* 228 NY 269, 127 NE 237, 9 ALR 1384.

The defendant may present evidence to disprove the claim of abandonment, in which event the burden of explanation shifts to the plaintiff. The question whether the proof adduced by the defendant is sufficient to overcome the acts set forth by the plaintiff and disprove the latter's contention is essentially one of fact for the jury to decide in the light of all the surrounding circumstances. *Moon v. Rollins*, 36 Cal 333, 95 Am Dec 181.

The legal concept of abandonment has been applied to a wide variety of articles of personal property, as well as real property. Thus, the law will, in a proper case, consider that a party has abandoned all right to a contract, vessel, farm, patent, trademark, house, trust, or a tract of land. The prin-

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ciples set forth herein are generally applicable to all species of property, regardless of its character.

It is possible for a party to abandon all right in a franchise, easement or other incorporeal property right. For example, a party who owns an easement may abandon the same by intentionally disregarding all elements of ownership, and freely conceding a claim of utter divesture of title. Similarly, a mining right may be totally abandoned, so as to confer a good title in the first person acquiring the same after the acts of abandonment. Annotation: 135 Am St Rep 892.

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ABUSE OF PROCESS, ACTION FOR

(Action against magistrate for illegal or improper use of process after its issuance in due course)

- Q—You are the plaintiff in this action?
- Q—Were you summoned to appear before a magistrate in the 5th district, Borough of Brooklyn, during July of 1942?
- Q—Do you recall the exact date you were served with this process?
- Q—And the date of your appearance?
- Q—What was the nature of the charge made against you in that proceeding?
- Q—Do you have with you a copy of the process served on you at that time? A—Yes, this is the summons I received.
(Marked in evidence.)
- Q—Did you testify at this hearing?
- Q—Do you recall who appeared on behalf of the complainant?
(A copy of the minutes should be procured and read into evidence.)
- Q—Who appeared on your behalf at this hearing?
- Q—What ruling did the court make after hearing all the evidence?
- Q—Did you at any time enter a plea of guilty to the charges made?
- Q—Did you at any time make an admission of your guilt?
(The proof should be clear in establishing the preliminary background of the relationship between the parties.)
- Q—How long have you known Judge Smith, the magistrate that presided in the hearing of your case?
- Q—Prior to the issuance of process in this case, did Judge Smith ever issue any threats or warnings to you respecting your conduct in his court?
- Q—Describe in detail the circumstances of these threats and warnings.
- Q—Will you please fix the time and place of these occurrences?
- Q—Who was present at each of these occasions?
- Q—What conversations, if any, did you have with Judge Smith following the hearing in your case?

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(The proof should be directed to a showing that the magistrate perverted to his own use, and for the accomplishment of an improper purpose, process regularly issued. See *Dean v. Kochendorfer*, 237 NY 384, 143 NE 229.)

(In the case last cited, the court held that a magistrate is liable in an action for abuse of process where he instigates a prosecution before himself, without probable cause, and for his own purposes.)

Abuse of process may be legally defined as the wilful and malicious use of process for purposes not authorized by law. It is the perversion of legal process to satisfy a prejudice, spite, or hatred, or for private gain in a manner inconsistent with the legal use of such process. Such abuse may extend to civil or criminal process, and may cover a wide variety of situations in either field. A clear line of demarcation should be drawn between abuse of process and malicious prosecution; there are basic differences that distinguish one from the other. In the former, the action is grounded in the abuse of process after it has been issued, while in the latter instance the action is based upon the malicious acts that caused the process to originally issue. *Waters v. Winn*, 142 Ga 138, 82 SE 537, LRA1915A 601; *Atlanta Ice & Coal Co. v. Reeves*, 136 Ga 294, 71 SE 421, 36 LRA(NS) 1112; *Nix v. Goodhill*, 95 Iowa 282, 63 NW 701, 58 Am St Rep 434; *Lambert v. Breton*, 127 Me 510, 144 Atl 864; *Humphreys v. Sutcliffe*, 192 Pa 336, 43 A 954, 73 Am St Rep 819; *Rock v. Abrashin*, 154 Wash 51, 280 Pa 740, 65 ALR 1280; Annotation 24 LRA(NS) 301.

The distinction should be borne in mind between an action for abuse of process and one for false imprisonment. In the latter case, the basis of the action is in depriving the plaintiff of his liberty without any legal excuse, or without such justification as the law requires. *Jackson v. American Tel. Co.* 139 NC 347, 51 SE 1015, 70 LRA 738.

"The gist of the action for abuse of process lies in the improper use of process after it is issued. To show that regularly issued process was perverted to the accomplishment of an improper purpose is enough. If a magistrate instigates a prosecution before himself without probable cause, and deliberately uses the process issued by him therein, not for the legitimate purpose of hearing the case, but to show his authority and to gratify his personal feelings of impor-

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tance, the act savors of oppression and constitutes an illegal abuse of process." *Dean v. Kochendorfer*, 237 NY 384, 143 NE 229.

"The gravamen of an action for abuse of process is the wilful using of the process, civil or criminal, for a purpose not justified by law and to effect an object not within its proper scope." *Kashdan v. Wilker Realty Co.* 189 NY Supp 138, 197 App Div 659.

An action for abuse of process may arise or be based upon the illegal manner in which process is served, as where undue force is used or property destroyed; the persistent seizure and garnishment of exempt property, the use of a subpoena for improper and unauthorized purposes, or the extortion of funds through the illegal use of process. *Snydacker v. Brosse*, 51 Ill 357, 99 Am Dec 551. Annotation: 65 ALR 1283. Annotation: 86 Am St Rep 404. *Mc Clenny v. Inverarity*, 80 Kan 569, 103 P 82, 24 LRA(NS) 301.

It is essential that the proof assembled in support of the plaintiff's case show the commission of a wilful and intentional abuse of legal process, for the purpose of effecting a wrongful act. Actual malice is implied, but the acts themselves should be clearly set forth and proven in such manner as to justify the conclusion that they were born of actual malice and ill-will. *Glidewell v. Murray-Lacy & Co.* 124 Va 563, 98 SE 665, 4 ALR 225.

It should be noted that the mere occurrence of property damage, personal inconvenience, or injury to reputation, is insufficient to establish an action instituted out of sheer spite and ill-will as an abuse of process. *Lobel v. Trade Bank*, 229 NY Supp 778, 132 Misc Rep 643.

Counsel for the plaintiff should be careful to include as part of his evidence all facts and circumstances indicative of spite, ill-will, or malicious intent. Thus, where it can be shown that an officer levying upon property knew the same to be exempt, such proof may aid in the recovery of punitive damages. *Lynd v. Pickett*, 7 Minn 184, 82 Am Dec 79.

"Want of probable cause and malice are seldom established by direct evidence of an ulterior motive. They often rest upon circumstances such as the relation of the parties and the object sought or accomplished. Where malice or any improper or wrongful motive or lack of probable cause exists,

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it may be inferred that the act was malicious." *Dean v. Kochendorfer*, 237 NY 384, 143 NE 229.

Conversely, it behooves the plaintiff to be prepared to show that he did all possible to minimize the damages incurred, and that he did not knowingly follow a course of action calculated to aggravate the damages or injuries suffered.

The action may be directed against any person who employs the process of the court in pursuit of a private venture of his own, as distinguished from a course of action justified or directed by the writ of process. Such broad liability may extend to a private person, public officer, or an attorney. *Waters v. Winn*, 142 Ga 138, 82 SE 537, LRA1915A 601; *Slomer v. People*, 25 Ill 70, 76 Am Dec 786; *Nix v. Goodhill*, 95 Iowa 282, 63 NW 701; *Sallem v. Glovsky*, 132 Me 402, 172 A 4; Annotation 47 ALR 268.

One who ratifies the acts of another is liable, where the course of action amounts to an abuse of process. Annotation: 86 Am St Rep 397.

Not only is the officer who actually causes the abuse of process to take place liable for the consequences thereof, but his agent or deputy or other authorized representative is also liable therefor. *Vandiver v. Pollak*, 107 Ala 547, 19 So 180, 54 Am St Rep 118; *Lamb v. Day*, 8 Vt 407, 30 Am Dec 479.

The proof of damages should be clear and definite. It should be shown that such damages as are claimed to have resulted were the proximate cause of the acts set forth. The plaintiff may recover for all pecuniary losses suffered as a natural and legal consequence of the abuse of process. *Italian Star Line v. U. S. Shipping Board*, 53 F(2d) 359; *Giddings v. Freedley*, 128 F 355; *Barnett v. Reed*, 51 Pa 190, 88 Am Dec 574.

Punitive damages may, according to some authorities be recovered in actions for abuse of process, where the acts complained of were malicious and vindictive in character. *Barnett v. Reed*, 51 Pa 190, 88 Am Dec 574.

An action for abuse of process is not necessarily established by reason of the fact that the original process is invalid due to the unconstitutionality of the statute under which it was issued. *Glidewell v. Murray-Lacy & Co.* 124 Va 563, 98 SE 665, 4 ALR 225.

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ACCESSION, ACTION BY ORIGINAL OWNER

(Action by purchaser in good faith of motor vehicle stolen from original owner, for value of repairs and additions)

Q—You are the plaintiff in this action?

Q—Did you, on or about the 4th day of May 1942, purchase a Ford car?

Q—Do you recall the exact date you made this purchase?

Q—From whom did you purchase this car?

Q—And what was the agreed price?

Q—How much of this did you pay?

Q—In whose possession was the car at the time you took delivery?

Q—And on what date did you take delivery?

Q—Please describe the condition of the car at that time.

Q—Did you operate the car immediately after your purchase of the same?

Q—What, if anything, did you notice unusual about the operation of the car?

Q—What repairs, if any, did you make to the car?

Q—Where were these repairs made?

Q—Did you receive a bill for the repairs?

Q—And what was the amount of this bill?

Q—Did you pay that bill?

Q—For how long a period did you thereafter operate the car?

Q—During that period of time, did anyone make claim to that car?

Q—Upon what date was the car taken from you?

Q—Did you, at any time prior to this date, have any knowledge of any interest by the defendant in the car?

Q—Did you know, for example, that this car was originally stolen from the defendant?

Q—Did you make any demand upon the defendant for repayment to you of the amounts expended in repair of the car?

Q—Were such amounts paid to you?

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Accession denotes the right which the owner of property has to any increase therein, whether such increase arises from natural or artificial causes. The term covers a wide variety of situations, as for example, the enlargement of land through the deposit of soil brought by water, as well as the increase brought about by the mating of animals.

Trials involving rights under the doctrine of accession frequently center around the theft, or other unauthorized taking or use, of property. Thus, where a car is stolen and then sold to a purchaser in good faith, who makes valuable repairs thereon, the question will arise as to his right of offset for the value of such repairs. The same question will arise where a trespasser in good faith, and without any unlawful intent, makes use of land or property belonging to another.

An important factor in trials involving accession is the intent of the party who makes the enlargements or additions to the property. The law draws a sharp distinction between an actor with knowledge of the true rights of the original owner, and one who acts in ignorance thereof and in absolute good faith. Obviously a trespasser, with full knowledge of the situation, acquires no right or title to the goods he illegally secured, regardless of the nature or extent of the additions or improvements he made thereon. *Silisbury v. McCoon*, 3 NY 379, 53 Am Dec 307; *Snyder v. Vaux*, 2 Rawle (Pa) 423, 21 Am Dec 466.

It should be noted, however, that a trespasser or taker in good faith who makes changes to property belonging to another, may set up the value of any additions or changes he made to the original chattel, in an action to recover the value of the property. *Murphy v. Sioux City & P. R. Co.* 55 Iowa 473, 8 NW 320, 39 Am Rep 175.

A common example of an accession is the addition of repairs to an object or article, which additions are deemed to belong to the original owner and to become merged in the principal object. *Bozeman Mortuary Asso. v. Fairchild*, 253 Ky 74, 68 SW(2d) 756, 92 ALR 419.

Thus, where a motor vehicle is brought to a garage for repairs and mechanical additions are made in the interest of better functioning of the car, the law considers that such additions become part of the original object and hence belong to the owner thereof, notwithstanding any liens which the law

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may create in favor of the garageman. *Bozeman Mortuary Assn. v. Fairchild*, 253 Ky 74, 68 SW(2d) 756, 92 ALR 419, where the court held that new tires and a new battery assumed the character of the original object so as to become part thereof, in contemplation of law. As stated by the court: "The removal of these accessories . . . would destroy the machine's usefulness until the owner should replace them. It may be said, then, that these accessories were united to the principal thing so as to constitute an integral part of it and the owner of the greater acquired title to the lesser articles."

The right of the owner of property to which additions have been made or created to its return is clear and undoubted, except where there has been an entire change of identity and form resulting in a change of title, or a material increase in the intrinsic value of the property. *Foote v. Merrill*, 54 NH 490, 20 Am Dec 151; *Baker v. Wheeler*, 8 Wend (NY) 505, 24 Am Dec 66.

In the exercise of such right of return, the owner of the property may sue out a writ of replevin. *Ellis v. Wire*, 33 Ind 127, 5 Am Rep 189; *Wing v. Milliken*, 91 Me 387, 40 A 138, 64 Am St Rep 238.

The rightful owner may, in lieu of resorting to replevin to secure the return of the property involved, institute an action for damages sustained as a result of the conversion of such property. *Foote v. Merrill*, 54 NH 490, 20 Am Rep 151. It is clear that where the original property has so lost its identity, or changed form as to be unrecognizable, that replevin is not indicated and that the remedy of the owner is in an action for damages based upon conversion.

An innocent taker of property, without knowledge of the true rights of the owner, who makes such additions or changes to the property as to completely change the identity, form or nature of the object, and thereby create a new article, acquires title thereto, according to the weight of authority, subject to the original owner's right of compensation, not in excess of the value of the object at the time of its taking. *Gaskins v. Davis*, 115 NC 85, 20 SE 188, 25 LRA 813.

The theory underlying this rule is that the original object has vanished beyond the point of identity, so that the owner finds it impossible or impractical to attempt isolating the original form or character of the article. At the same time,

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however, it seems clear that the factual situation in each case will alone determine the extent to which the law will deprive the rightful owner of his property, and relegate him to a secondary position.

In those instances where the taking was in good faith, the person who purchases from the wrongdoer may offset the value of any work or improvements made by the original taker or trespasser, in an action by the original owner, thereby confining the latter to the value of the chattels when first taken from him. Annotation: 44 ALR 1327.

The bona fide purchaser may also deduct the value of his labor and the materials expended in the change or improvement of the object. *Peters v. Lesh*, 119 Ind 98, 20 NE 291, 12 Am St Rep 367.

**"ACCIDENTAL" INJURY OR DEATH,
ISSUE INVOLVING**

- Q—You are the plaintiff in this action?
- Q—Did you, on or about the 8th day of November, 1944, enter into an agreement with the defendant in this action concerning certain insurance? A—I did.
- Q—Did you thereafter receive written evidence of such agreement, or a document evidencing same? A—I did.
- Q—I show you what purports to be an insurance policy and ask if that is the agreement or document you refer to?
(Offered in evidence.)
(Counsel should read into the record in the hearing of the jury such portions of the policy as define accidental injury or death, or the meaning of the term "accidental.")
- Q—On what date did you receive this policy?
- Q—Thereafter, and on or about December 3rd, 1944, what, if anything, happened to you? A—I got a sunburn over my back and shoulders and applied a salve to it the same evening; after that my back became swollen, etc.
(Describe in detail the train of events leading up to, and comprising, the injury claimed as accidental.)
- Q—Did you have any trouble with your back or shoulders prior to this date?
(Competent medical testimony should be produced to establish the act of the plaintiff, and the condition that he sought to treat, as the proximate inducing cause of the injury or disability complained of.)
-

The broad rule is well settled that a recovery does not ordinarily lie by, or on behalf of, an assured under an accident policy where the death or injury forming the basis of the claim is the result of the voluntary act of the assured. *Western Commercial Travelers' Asso. v. Smith*, 85 Fed 401, 40 LRA 653; *Hastings v. Travelers Ins. Co.* 190 Fed 258; *Rock v. Travelers Ins. Co.* 172 Cal 462, 156 Pac 1029; *Schmid v. Indiana Travelers Acci. Asso.* 42 Ind App 485, 85 NE 1032; *Salinger v. Fidelity Co.* 178 Ky 369, 198 SW 1163.

It is frequently difficult to draw a clear line of demarcation between those injuries which are inherently accidental in their character, and those which are partly or wholly deliberate on the part of the assured. Much of the confusion in this respect

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centers around those instances where the act or acts in question are deliberate and intentional on the part of the assured, but without any foresight as to the consequences thereof. See cases collected in 7 ALR 1131. See also: *Western Commercial Travelers' Asso. v. Smith*, 85 Fed 401, 40 LRA 653; *Hastings v. Travelers Ins. Co.* 190 Fed 258; *Rock v. Travelers Ins. Co.* 172 Cal 462, 156 Pac 1029; *Schmid v. Indiana Travelers Acci. Asso.* 42 Ind App 485, 85 NE 1032; *Salinger v. Fidelity Co.* 178 Ky 369, 198 SW 1163; *Bailey v. Interstate Casualty Co.* 40 NY Supp 513, 8 App Div 127.

This difficulty is illustrated in the case of death resulting from an inflammation of the brain caused by the voluntary act of the assured in pricking a pimple on his lip, where the court held that death was accidental within the purview of a policy insuring against death from accidental means. *Lewis v. Ocean Acci. & Guarantee Corp.* 224 NY 18, 120 NE 56. See also: *Interstate Business Mens Acci. Asso. v. Lewis*, 257 Fed 241; *Western Commercial Travelers Asso. v. Smith*, 85 Fed 401, 56 US App 393; *Sherman v. Fall River Iron Works*, 2 Allen (Mass) 524, 79 Am Dec 799.

In summarizing the authorities and propounding the rule of law applicable to such situations, the court held:

"We think there is testimony from which a jury might find that the pimple had been punctured by some instrument, and that the result of the puncture was an infection of the tissues. If that is what happened, there was an accident. We have held that infection resulting from the use of a hypodermic needle is caused by "accidental means." The same thing must be true of infection caused by the puncture of a pimple. Unexpected consequences have resulted from an act which seemed trivial and innocent in the doing. Of itself, the scratch or the puncture was harmless. Unexpectedly it drove destructive germs beneath the skin, and thereby became lethal. To the scientist who traces the origin of disease there may seem to be no accident in all this. 'Probably it is true to say that in the strictest sense, and dealing with the region of physical nature, there is no such thing as an accident.' But our point of view in fixing the meaning of this contract must not be that of the scientist. It must be that of the average man. Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unfore-

seen, unexpected, extraordinary, an unlooked-for mishap, and so an accident. This test—the one that is applied in the common speech of men—is also the test to be applied by courts.

“The defendant argues that the puncture may not have caused the infection. But the plaintiff’s experts say that in their opinion the entrance of the germs from the skin into the deeper tissues was the result of trauma. They say that trauma is almost invariably the cause of such infections. We find the signs of trauma here in the punctured wound which was visible when the physician was first consulted. The insured was an athlete in the prime of life and the fullness of health; the infection was not due, therefore, to lowered powers of resistance. The punctured wound is an adequate cause. The evidence suggests no other; at least, a jury might so find. Here, as elsewhere, the law contents itself with probabilities, and declines to wait for certainty before drawing its conclusions.” *Lewis v. Ocean Acci. & Guarantee Corp.* 224 NY 18, 120 NE 56.

In a similar case a claim was made on behalf of an assured who used an infected scarf pin to puncture a pimple, and thereby caused an infection which resulted in his death. *Interstate Business Mens Acci. Asso. v. Lewis*, 257 Fed 241.

The court held in this case:

“Counsel for defendant further contends that, if the deceased selected a scarf pin in ignorance of its infected condition, to use in making a voluntary puncture of the skin, this fact would not make the means of death accidental. To sustain this proposition, a distinction is sought to be drawn between the intentional selection of an instrument in ignorance of some peculiar property which it possessed, and the inadvertent selection of an instrument known to be inappropriate. The last named situation, it is admitted, might be an accidental means; but in advertently selecting an instrument known to be inappropriate there is no intention of selecting that instrument; neither was there, in the case at bar, any intention to select an infected instrument. Such refinement may be indulged in as a matter of intellectual pleasure, but in the practical adjustment of the rights of parties to an insurance contract it ought not to be given much weight. There is no evidence or finding that deceased knew as a fact that the scarf pin was infected, and we

are not prepared to decide that the knowledge as to bacterial infection has been so widely diffused that the deceased was bound to know that fact. The stipulation of facts is silent upon the question; but as the trial court found in favor of the plaintiff it must have found that the deceased did not know, nor could he be presumed to know, of the presence of bacteria upon the pin. We are therefore of the opinion that the death of deceased was due to a bodily injury effected by external, violent, and accidental means." Ibid.

A concise and practical definition of the term "accidental," as used in evaluating the character of an event for purposes of determining coverage under an insurance policy, is contained in the following statement:

"The significance of this word 'accidental' is best perceived by a consideration of the relation of causes to their effects. The word is descriptive of means which produce effects which are not their natural and probable consequences. The natural consequence of means used is the consequence which ordinarily follows from their use,—the result which may be reasonably anticipated from their use, and which ought to be expected. The probable consequence of the use of given means is the consequence which is more likely to follow from their use than it is to fail to follow. An effect which is the natural and probable consequence of an act or course of action is not an accident nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds. On the other hand, an effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of these means, an effect which the actor did not intend to produce, and which he cannot be charged with the design of producing, under the maxim to which we have adverted, is produced by accidental means. It is produced by means which were neither designed nor calculated to cause it. Such an effect is not the result of design, cannot be reasonably anticipated, is unexpected, and is produced by an unusual combination of fortuitous circumstances; in other words, it is produced by accidental means." *Western Commercial Travelers Assn. v. Smith*, 85 Fed 401, 56 US App 393.

It is also pointed out that "a man who eats infected food,

without knowledge of its infection, is doing something he did not intend to do. The eating of the food is voluntary, but the eating of the poison is not. The housewife goes to the flour bin, kneads her bread, bakes it, and serves it. Those who eat it die. It is found that the bin contains not only flour, but arsenic. The unfortunates voluntarily eat the bread, composed of flour and arsenic. The 'means' causing death, are accidental." Ibid.

While the question as to what constitutes an "assault," or "fighting" as used in an accident insurance policy, depends to a large extent upon the peculiar provisions of each policy, as well as the facts of each case, the decisions interpreting the above terms have laid down certain rules which offer a guide. See cases collected in 97 ALR 760.

It is generally held that the use of the order "assault" or "combat" or "fighting" implies an act of aggression on the part of the insured. *Eminent Household v. Payne*, 18 Ala App 23, 88 So 454; *Coles v. New York Casualty Co.* 87 App Div 41, 83 NY Supp 1063; *Jacobs v. Loyal Protective Ins. Co.* 97 Vt 516, 124 A 848.

It is further held that the aggression or assault on the part of the insured which will relieve the insurer from liability must be such as would justify the person assaulted in taking the life of the insured. *Gilman v. New York L. Ins. Co.* 79 SW(2d) 78 (Ark).

It is clear that where the insured was the aggressor and his injury or death the direct result thereof, that the limiting provision of the policy applies to relieve the insurer of liability under the policy. *Eminent Household v. Payne*, 18 Ala App 23, 88 So 454.

It is necessary in all cases of this character to examine carefully the provisions of the policy in the light of the facts of each case, to determine who provoked the assault, to what extent the insured participated therein, and all other surrounding facts and circumstances. See cases collected in 97 ALR 760.

The presumption in cases of this character is largely in favor of the plaintiff, upon proof of the death of the insured or his injury from accidental or violent means. *Metropolitan Casualty Co. v. Chambers*, 136 Ark 84, 206 SW 64.

"It is the settled law in this state that proof of death of an insured from injuries received by him raises a presumption

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of accidental death, within the meaning of an insurance clause insuring against injury by external, violent, and accidental means, and this presumption will continue until overcome by affirmative proof to the contrary on the part of the insurer." *Ibid.*

In another case it was pointed out that "if the insured is killed by another in his necessary self-defense, then it cannot be said that his death was accidental within the meaning of the policy and affords the insurer a complete defense to an action on the policy for accidental death. But the burden is upon the insurer to prove justification, and there is no presumption of law that the killing was with justification." *Gilman v. New York L. Ins. Co.* 79 SW(2d) 78 (Ark).

It is generally a question for the jury to determine as to whether a death or injury by accident or violent means is an "accident" within the terms and conditions of an insurance policy, particularly where the evidence is conflicting as to whether or not the insured's death or injury is the result of his own unlawful conduct, or whether he voluntarily set in motion a train of events the consequence of which he should have reasonably foreseen in the exercise of care. See *Couch on Insurance*, vol. 5, No. 1158.

Such determination is, of course, dependent upon the nature of the contractual provisions in the insurance policy. *Gilman v. New York Life Ins. Co.* 79 SW(2d) 78 (Ark).

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ACCOUNT STATED, ACTION UPON

(Action to recover amount of stated account)

- Q—You are the plaintiff in this action?
- Q—In what business are you engaged? A—In the retail hardware business.
- Q—Did you, during the month of July 1942, sell goods and merchandise to the defendant in this action?
- Q—Describe the nature of these sales.
- Q—On what dates were deliveries made of each item?
- Q—What was the agreed price for such material?
- Q—Describe the nature of any agreement or contract entered into with the defendant respecting payment for these items.
- (Was such agreement oral or in writing?)
- Q—Did you render a bill for such material?
- Q—When was such bill rendered?
- Q—What other bills were rendered?
- Q—What payments, if any, were made on account?
- (The proof should go into detail in establishing the circumstances leading up to the account stated, and fully establishing the same.)
- Q—What conversation, if any, did you have with the defendant respecting payment of his account? A—The defendant questioned the accuracy of my figures, and said some deduction should be made for imperfections in the merchandise. We agreed that \$460 would be the balance due and owing.
- Q—Did you make demand for this sum?
- Q—Did the defendant pay any part of such sum?
-

An account stated is an agreement between the parties striking a stated sum upon an account as representing the amount due from one to the other; such agreed sum replaces all former understandings between the parties upon the subject matter, and constitutes a new and separate cause of action. *Jasper Trust Co. v. Lamkin*, 162 Ala 388, 50 So 337, 24 LRA(NS) 1237; *Brown v. Southern Grocery Co.* 168 Ark 547, 271 SE 342, 40 ALR 383; *Fee v. McPhee Co.* 31 Cal App

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295, 160 P 397; Davidson v. Johnson, 24 Idaho 336, 133 P 929, Ann Cas 1915C 1129; Reed v. Thomas, 134 Kan 849, 8 P(2d) 379, 84 ALR 110; Chace v. Trafford, 116 Mass 529, 17 Am Rep 171; Thomasma v. Carpenter, 175 Mich 428, 141 NW 559, 45 LRA(NS) 543; Cold Spring Granite Co. v. Jacobson Bros. 179 Minn 63, 228 NW 344; Newburger-Morris Co. v. Talcott, 219 NY 505, 114 NE 846, 3 ALR 287; Stinson v. Stallsmith, 178 Wash 383, 34 P(2d) 1117.

An "account" is merely an unpaid balance, claim or demand, showing the amount due from one person to another. The transaction, and relationship created thereby, may be in writing or oral, or partly written and partly oral.

A mutual account is an account that comprises items of debit and credit on both sides; it is a matter of mutual set-offs. Mutual debts will not, standing alone, create a mutual account. There must be a distinct understanding that such debts are to be merged into one account.

An open account is an unpaid account, or one that is still subject to adjustment and payment. It means a transaction, or series of transactions, not yet concluded.

An outstanding account is generally understood to mean an account that is unpaid, and may include both good and bad accounts.

A "current" or "running" account indicates an account that is still "open." (See definition under that term.)

The mere submission of a proposed statement or settlement of an open account does not establish a binding accord upon such account, although the retention of such account by the party to whom it is sent will, according to the weight of authority, constitute an account stated. First National Bank v. Allen, 100 Ala 476, 14 So 335, 27 LRA 426; Griffith v. Hicks, 150 Ark 197, 233 SW 1086, 18 ALR 882; Union Tool Co. v. Farmers & M. Natl. Bank, 192 Cal 40, 218 Pac 424, 28 ALR 1417; Thos. O'Hanlon Co. v. Jess, 58 Mont 415, 193 Pac 65, 14 ALR 237; Newburger-Morris Co. v. Talcott, 219 NY 505, 114 NE 846, 3 ALR 287. Annotation: 84 ALR 114.

An account that is stated is generally due and payable immediately, Greenwood v. Curtis, 6 Mass 358, 4 Am Dec 145, although in some jurisdictions the amount agreed upon as the balance is due only upon due demand made therefor. Annotation: 136 Am St Rep 40.

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The Statute of Limitations runs upon a stated account from the time of the accord between the parties. *Chace v. Traf-ford*, 116 Mass 529, 17 Am Rep 171.

The law places no restrictions as to the class of persons that may enter into an account stated; the agreement may be reached by the merchant and his debtor, attorney and client, or between partners. Beyond the simple requirements applicable to contracts generally, any competent person may agree with another that a stated account is to be due and owing in a fixed amount, and that such accord is to replace all prior understandings upon the same matter.

It is, of course, essential that the agreement reached between the parties pertain to liquidated damages, as distinguished from an undetermined and unliquidated amount. Similarly, it is essential that the transaction be legal in its nature, and not such as to contravene public policy.

An account stated is conclusive upon the parties, and as fully binding as a contract entered into with all the formality required by law. *Roberts v. Benjamin*, 124 US 64, 31 L ed 334; *Leather Mfrs. Nat. Bank v. Morgan*, 117 US 96, 29 L ed 811; *Langdon v. Roane*, 6 Ala 518, 41 Am Dec 60; *Griffith v. Hicks*, 150 Ark 197, 233 SE 1086, 18 ALR 882; *Vaughan v. Tulare County*, 56 Cal App 261, 205 P 21; *Wahl v. Barnum*, 116 NY 87, 22 NE 280, 5 LRA 623.

While a stated account represents a fixed and binding agreement, either party may impeach the same on the ground of fraud, mistake or error. *Gutshall v. Cooper*, 37 Colo 212, 86 P 125, 6 LRA(NS) 820; *Louisville Bkg. Co. v. Asher*, 112 Ky 138, 65 SW 133, 99 Am St Rep 283; *Huggins v. Commercial & Sav. Bank*, 141 SC 480, 140 SE 177.

Stated differently, an account of this character is merely prima facie evidence of its correctness and validity, and like other agreements is subject to attack for acts constituting fraud, or for mistakes or omissions. *Leather Mfrs. Natl. Bank v. Morgan*, 117 US 96, 29 L ed 811.

Impeachment of an account stated is restricted to instances where setting aside of the agreement will not alter the position of the opposite party to his prejudice. *Hoover-Dimeling Lumber Co. v. Neill*, 77 W Va 470, 87 SE 855, 11 ALR 575.

The burden of proof in actions to set aside a stated account is upon the party raising that issue; *Young v. Hill*, 67 NY

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162, 23 Am Rep 99; *Dodson v. Watson*, 110 Tex 355, 220 SE 771, 11 ALR 583; *Hoover-Dimeling Lumber Co.* 77 W Va 470, 87 SE 855, 11 ALR 575.

Such proof should be clear and convincing, based upon more than an apparent injustice, dissatisfaction over the terms, or mere suspicion of unfair advantage. *Ibid.*

An action upon an open account should include all unpaid items, as no further action may be maintained upon the same running account for omitted items. *Pomeroy v. Prescott*, 106 Me 401, 76 A 898, 138 Am St Rep 347.

According to other authorities, where the separate items of an account are born of separate and distinct transactions, each with its own terms of credit, such sales may be viewed as independent matters sufficient to support an independent action. *Williams Abbott Electric Co. v. Model Electric Co.* 134 Iowa 665, 112 NW 181, 13 LRA(NS) 529.

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ACCOUNT STATED, AUTHORITY OF AGENT TO SETTLE

- Q—You are the plaintiff in this action?
- Q—In what business are you engaged? A—The manufacture of paper products.
- Q—Were you engaged in this business on June 4th, 1943?
A—Yes.
- Q—Did you, on or about that date, receive a shipment of paper rolls from the defendant in this action? A—Yes.
- Q—Describe this shipment.
- Q—Was this delivery made in accordance with any agreement between you and the defendant?
- Q—Describe this agreement.
- Q—With whom did you conduct this correspondence on behalf of the defendant? A—With John Gilles, the secretary of the defendant.
- Q—Did you, at any time subsequent to the making of this agreement, have any conversations or correspondence with the secretary of the defendant corporation?
- Q—Explain the nature of these conversations.
- Q—Did you later receive a bill or invoice from the defendant for this shipment of goods?
- Q—Did you pay this bill at that time? A—No.
- Q—Was the bill subsequently paid by your company? A—Yes.
- Q—Prior to payment of this bill, did you have any conversations with the secretary of the defendant corporation respecting the amount of the bill?
- Q—Will you please tell us the substance of these conversations. A—He told me to deduct 20% from the bill because of the lateness of the shipment, etc.
- Q—Where were these conversations had, and at what dates?
- Q—For how long a period of time have you transacted business with the defendant company?
- Q—And how often during this period have you transacted business with the secretary of the defendant corporation?

The rule is well settled that an authorized agent may con-

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sent to settlement of an account as against his principal, or agree as to the amount of an indebtedness in dispute, provided his actions are within the scope of his agency, and occur during the course of regular transaction of business. *Powell v. Wade*, 109 Ala 95, 19 So 500; *Gutshall v. Cooper*, 48 Colo 160, 109 Pac 428; *Klotz v. Butler*, 56 Miss 333; *Dowagiac Mfg. Co. v. Hellekson*, 13 ND 257, 100 NW 717; *Batavian Bank v. Minneapolis etc. R. Co.* 123 Wis 389, 101 NW 687.

"An account stated being simply an agreement between parties who have had previous monetary transactions that all the items of the accounts representing such transactions are true, such agreement need not necessarily be made by the parties personally, but may be made in behalf of either party by an agent having authority." *Sariol v. McDonald*, 111 NY Supp 796, 127 App Div 648.

To illustrate, it has been held to be within the authority of the secretary of a company to make a declaration to an employee of the amount due him for services rendered, so that this account may be considered fully binding on the company; the theory being that the act in question is clearly within the duties of the secretary. *Smith v. Sinbad Development Co.* 11 Cal App 253, 104 Pac 706.

Similarly it has been held that where a local manager was given authority to compromise disputed accounts, his settlement of an amount in controversy for a sum less than that actually due the corporation, was binding upon the latter, notwithstanding that the local manager had no specific authority to discount accounts without express authority from the home office. Annotation: 2 ALR 73.

It is important in all cases of the character under discussion to prove all the surrounding facts and circumstances so as to show the apparent and actual authority of the agent, and any holding out which is consented to by the principal. Annotation: 2 ALR 71.

There is authority for the view that if the person agreeing to settlement of an account lacked actual authority, his acts will not bind the corporation. *Moore v. Maxwell*, 155 Ala 299, 46 So 755; *Gutshall v. Cooper*, 48 Colo 160, 109 Pac 428; *Mink v. Morrison*, 42 Mich 567, 4 NW 302; *Moody v. Thwing*, 46 Minn 511, 49 NW 229.

"Even if such an authority might be implied from the gen-

eral duties of a treasurer or assistant treasurer when such officer has rendered an account to a debtor of the corporation, it by no means follows that actual authority need not be shown when the legal effect of the act would be to liquidate or establish unsettled demands against the corporation. An officer who does not possess the power to create a debt against the corporation directly cannot do it indirectly by sending an account which shows a balance due to the person to whom it is sent." *Harvey v. West Side Elev. R. Co.* 13 Hun(NY) 392.

A corporation bookkeeper has been held not to possess the authority to render an account to a creditor of the corporation, showing the balance due, so as to make such action binding on the corporation, in the absence of direct proof of express authority. *Gutshall v. Cooper*, 48 Colo 160, 109 Pac 428.

"The business of a bookkeeper is to make such entries in the books of his employer as he is ordered to do, to keep the accounts, and when he is directed, to draw off or copy from the books any that may be wanted and submit them to his principal, and then do with them as he may be directed. A mere clerk or bookkeeper has no more right, of his own accord, to state an account in the name of his principal, and acknowledge a balance as being due, than he has to create a debt by signing a promissory note. The obligation is only different in form, but equally binding. No man would ever be safe if it were permitted that he should be bound by any and every account his clerk or bookkeeper might state and deliver to another person, acknowledging that a balance was due or owing on it, without any other authority than that conferred by law upon an agent of that description." Annotation: 2 ALR 80.

Trial counsel should keep in mind that so far as third persons are concerned the law is well settled that an agent possesses such authority as is expressly or impliedly conferred upon him, and such further authority as he appears to have by reason of his position and any acts of the employer which serve to hold out such agent as possessing specific authority. See cases collected in 2 ALR 74.

"The agent was not attempting to carry out any previous contract he had made with the defendant, nor had he authority to do more than collect the balance due on the bill for beer. In such circumstances he would have no implied power to settle past items of dispute, nor could he receive anything but

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cash for his principal. Plaintiff was denying all liability for fraud or deceit on the part of its agent, and did not vest in him power to make any compromise or settlement thereof. Armed with no other authority than to collect the amount of plaintiff's bill for goods sold, its agent had no power to settle prior disputes or to accept anything in payment save the usual medium of exchange." *John Gund Brewing Co. v. Peterson*, 130 Iowa 301, 106 NW 741.

"It would be a legal absurdity to hold that the subsequent conduct of Biggers (the agent) amounted to a new or subsequent promise on the part of the defendant to pay the account, notwithstanding he may have originally authorized the purchase of material. It could as well be said that the defendant would be liable upon the promissory note executed by Biggers in settlement of the account for material. Authority to purchase did not, of itself, authorize Biggers to make subsequent promises or agreements for the defendant." *Moore v. Maxwell*, 155 Ala 299, 46 So 755.

ACCOUNT STATED, CONCLUSIVENESS OF

(For Questions, see "Account Stated, Action Upon")

The broad rule is well settled that an account stated is prima facie correct, and in the absence of proof of fraud or mistake, is prima facie sufficient to support a verdict for the amount therein set forth. *Keller v. Keller*, 18 Neb 366, 25 NW 364; *McCormick v. Interstate Consol. Rapid Transit R. Co.* 154 Mo 191, 55 SW 252; *Dobbs v. Campbell*, 10 Kan App 185, 63 Pac 289; *Dodson v. Watson*, 220 SW 771 (Tex), 11 ALR 583.

But the presumption created is not conclusive in its effect; it may be impeached for fraud in the procurement of the account stated or mistake. A well reasoned summary of the law in this connection is contained in the following:

"Prima facie evidence is merely that which suffices for the proof of a particular fact until contradicted and overcome by other evidence. If, therefore, an account stated is but prima facie evidence of the correctness of the balance acknowledged, which the law treats as promised to be paid, its office is simply to dispense with the proof of the particular items entering into the balance, casting upon the adverse party the burden of disproving its correctness. Such, we think, is essentially its true nature. Mere presumptive evidence cannot create an estoppel. A stated account does not, therefore, amount to an estoppel. It is open to impeachment, just as other presumptions are subject to be overcome by competent proof. It does not of itself amount to an obligatory agreement—a contract upon a new consideration, having all the sanctity of a written agreement. Its purpose is but to reach an agreed balance between the parties whereby the particular items may be eliminated. When that is done, its office is performed and the character of prima facie correctness in the balance is attained.

"The case may be brought within the principles of estoppel, or of an obligatory agreement between the parties, as when upon a settlement mutual compromises are made; but the mere stating of an account, in its very nature and purpose, precludes giving to the account when stated the character of a binding written contract. In modern business transactions, such, for instance, as between banks and their customers, it would be perilous to state accounts if the statement of the

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balance is to be held in all cases as creating a contract binding upon both parties and subject to no correction for errors unless they be due to the fault of both.

"It is upon such considerations that the established rule now is that an account stated does not create an estoppel, and is but prima facie evidence of the correctness of the items and the balance reached." *Dodson v. Watson*, 220 SW 771 (Tex), 11 ALR 583.

The burden of proof with respect to impeachment of an account stated rests upon the defendant. *Dobbs v. Campbell*, 10 Kan App 185, 63 Pac 289.

"This settlement of account between the parties could be overthrown, or opened, or corrected only upon the ground of fraud, mistake, omission of some item, accident, or undue advantage, and the burden of proving these necessary elements rested upon the defendants seeking to impeach the account, and the rule is further, that a stronger case must be made where the statement is in writing, . . . without any ambiguity respecting the terms thereof." *Dobbs v. Campbell*, 10 Kan App 185, 63 Pac 289.

Elsewhere it is stated: "In this case there is no allegation in the answer of fraud or mistake in the settlement. It is denied that there was a settlement, but in this it is clearly proved to be untrue. The burden of proof is upon the defendant, therefore, to show that his account then due was not taken into consideration in the settlement. If the plaintiff had been indebted to the defendant at that time, as he claims, it is not very probable that he would have executed a promissory note to the plaintiff for the amount found due to him." *Keller v. Keller*, 18 Neb 366, 25 NW 364.

Some courts have used the term "conclusive" in describing the character and binding effect of an account stated, although what is intended is no more than a prima facie effect, or a presumption subject to rebuttal upon competent proof of fraud or mistake. Thus, in one case, it was held: "When parties, having mutual matters of account between them growing out of a contract, deliberately account together and state a balance, and the party who, on such accounting, is found indebted to the other, pays the debt or gives a written obligation for its payment, this settlement is so far conclusive between the parties that it cannot be reopened or gone into, either at

law or in equity, except upon clear proof of fraud, or mistake, or of an express understanding that certain matters were left open for further adjustment." *McCormick v. Interstate Consol. Rapid Transit R. Company*, 154 Mo 191, 55 SW 252.

The allegations or proof as to fraud should be clear and distinct, and not based upon mere conjecture. "While an account stated and settled may be impeached for fraud or mistake in a court of equity, it can only be done upon a bill distinctly and clearly setting forth the specific errors, with distinct averments as to the time when the fraud, mistake, concealment or misrepresentation that caused such omissions was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been earlier made." *Tollar v. Bohemian Bldg. & L. Asso.* 187 Ill App 405.

The proof offered in impeachment should also relate to the account stated, as distinguished from matters not directly connected therewith, as for example, proof of an anterior liability. *Gordon v. Frazer*, 13 App DC 382.

The question of whether the presumption created by an account stated is sufficient to overcome any proof of fraud or mistake offered in rebuttal thereof, is largely a matter for the jury to determine in the light of all the facts and circumstances. *Tollar v. Bohemian Bldg. & L. Asso.* 187 Ill App 405; *Bourke v. James*, 4 Mich 336.

"While it is true, as a general proposition, that a settlement of accounts between parties is, *prima facie*, a settlement of all accounts, yet, as there was evidence in this case tending to show that the demand for which this action is brought was expressly excluded from the settlement . . . the circuit judge very properly left it to the jury to determine what was settled, and whether the facts attending the settlement showed a relinquishment of the demand in question by the defendants in error." *Bourke v. James*, 4 Mich 336.

The rules stated above are applicable to accounts stated between partners. Annotation: 11 ALR 604.

It is also stated in this connection: "To impeach a settlement solemnly made in writing, something must be alleged by way of attack on it more than mere epithetical statements and conclusions. If fraud is relied on, the nature of the fraud must be set forth, together with the circumstances under which it was practiced. If mistake or error be charged, the

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opposite party must be advised how the error entered into the settlement, its extent and the particulars set forth with certainty." *Knix v. Pearson*, 64 Kan 711, 68 Pac 613.

The relative weight of the presumption depends, of course, upon the facts and circumstances of each case. This is pointed out as follows:

"Mere errors alone will not always lead to the opening and restating of accounts; but even when there is an agreement that closed accounts shall not be opened for error after the death of the parties, or after a fixed period, a court of equity will open and restate the account for fraud, or great danger of fraud; and in case of such an agreement, even after the death of the parties, or long acquiescence, a settlement would be opened and the account restated, for an important error. When there is 'danger' of fraud, or when the accounts have been made up by parties having unrestricted power, and acting under strong personal interest, a long acquiescence will not establish a settlement beyond the reach of inquiry. . . . And the settlement is good for nothing if, either from the collusion of the parties or from the circumstances under which it takes place, it is proved in a court of equity that the transaction was not so fairly and so fully understood between the parties, either from the confusion in which it was involved, or from misrepresentation made on the one side or the other, as it ought to have been, and that injustice has been done on either side." *Peteet v. Crawford*, 51 Miss 43.

ACQUITTAL OR CONVICTION, PROOF OF .

(See Conviction or Acquittal, Proof of)

ADVERSE POSSESSION, MISTAKE IN BOUNDARY LINE

- Q—You are the plaintiff in this action?
- Q—Are you the owner of property designated as 502 Wilson Avenue, in the township of Lee?
- Q—Were you the owner of this property on January 5th, 1923?
- Q—When did you first acquire this property?
- Q—At that time did you have a survey made of the property?
- Q—Who made that survey?
- Q—Do you recall what the survey showed with respect to the easterly boundary of your property? A—It showed a line of eighteen poplar trees as the easterly boundary.
(Where it is possible to produce the survey, it should be proven at the trial; otherwise its absence satisfactorily explained.)
- Q—How soon after acquiring title to this property did you take actual possession?
- Q—Did you stake out the property at any time with respect to the easterly boundary?
(The proof should disclose in detail all acts on the part of the plaintiff showing a clear and open intent to claim the property up to the point of the trees, notwithstanding the boundary line falls short thereof.)
(The proof should also make clear any acts on the part of the defendant evidencing an acknowledgment or concession of the adverse possession of the plaintiff.)

The broad rule is stated that where a landowner is ignorant of the location of a boundary line on his property, but intends to claim only to the true boundary line, his possession of property extending beyond his actual boundary line, is not adverse and will not materialize into actual ownership. Pittsburgh etc. R. Co. v. Stickley, 155 Ind 312, 58 NE 192; Kotze v. Sullivan, 210 Iowa 600, 231 NW 339; Newton v. McKeel, 142 Or 674, 21 Pac(2d) 206.

Thus it has been stated that "When adjoining landowners treat a hedge between their tracts and near the true boundary as a practical partition fence, but are mistaken in supposing it to be upon the true line, and there is no agreement or recognition that it is to mark the real boundary and no intention by either to claim beyond the true line, the posses-

sion by either of a strip between the hedge and the true line is not adverse as to the other, and does not under such circumstances ripen into title." *Edwards v. Fleming*, 83 Kan 653, 112 Pac 836.

It has elsewhere been stated as follows:

"To acquire title to land under this theory (adverse possession), occupancy alone is not sufficient even for the statutory period. It must be shown that the possession was taken with the intention to assert title beyond the true boundary line. There must not only be possession, but a claim of a right to the possession up to the point of occupancy; or, in other words, the claim of right to possess must be as broad as the possession. Where the intention in taking possession of a piece of land is to occupy only up to the true line, no occupancy beyond that is adverse; or, in other words, where one takes possession of a piece of land, and claims a right to occupy the same up to the true line only, and by mistake of measurement, or otherwise, takes possession beyond the true line, and occupies it for the statutory period, he acquires no title by such occupancy. It is the absence of intent in taking possession beyond the true boundary line that fixes the character of the entry and determines that the occupancy is not adverse." *Griffin v. Brown*, 167 Iowa 599, 149 NW 833.

It should be noted, however, that adverse possession may take place where the claim is to a visible boundary or tangible land mark. See cases collected in 97 ALR 34.

Thus it has been pointed out that where adjoining landowners engaged the services of a surveyor to locate a boundary line, and thereafter proceed to erect a permanent fence on the line, that his possession is adverse.

As stated by the court: "The parties have gone about the business of locating the line between them that each may have and enjoy his own. When they have accomplished that purpose to their mutual satisfaction, the possession does not originate or continue under an admitted possibility of mistake; the parties are claiming to the line as the true line." *Ford v. Bradford*, 212 Ala 515, 103 So 549.

The rule is further illustrated by the holding that where a landholder takes and holds possessions of land as far as a fence, under a mistaken belief that the land is his up to the fence, that he thereby acquires title by adverse possession,

assuming of course that he openly claims the land as his own, with no concession or implication that there may be a mistake in the location of the true boundary line. *Turner v. Morgan*, 158 Ky 511, 165 SW 684.

An important factor in cases of the character under discussion is the condition of the mind of the claimant.

Thus it has been stated that the "condition of the mind of the person who claims a certain line as the true line is very different from that of one who claims only to the true line wherever that may be. In the mind of one, the boundary line is fixed. In the other it is subject to future ascertainment. The mere fact that a person in possession is ignorant of the true line does not weaken his rights, where he has, for the necessary period, claimed that the line as held by him was the true line." *Mangold v. Phillips*, 186 SW 988 (Mo).

The proof in cases involving adverse possession is essentially one concerning the intentions of the parties. Whatever circumstances or facts shed light upon the intent are pertinent and material to the issue.

The rule in this case has been well stated in the holding that it is not necessary for an adverse claimant to show "something akin to felonious intent on his part, and assert that, with full knowledge of the truth, he formed the intent to deprive the true owner of his land. In the nature of things, adverse holding usually originates in a mistake or misunderstanding. The finding shows that appellant held possession up to the fence for thirty-two years, exercising exclusive domain over the strip in dispute, and claiming to be its owner. He claimed that the fence was the true boundary and his possession was therefore adverse. The finding that appellant did not claim to be the owner of any portion of the land beyond or west of the true line must be considered in connection with his further claim that the fence was on the true line." *Logsdon v. Dingg*, 32 Ind App 158, 69 NE 409.

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ADVERTISING SIGNS UPON LEASED PREMISES, ACTION INVOLVING

- Q—You are the plaintiff in this action?
- Q—In what business are you engaged? A—The retail jewelry business.
- Q—Where do you maintain your place of business?
- Q—When did you assume occupancy of these premises?
- Q—Prior to this date, did you enter into any lease for rental of such premises?
- Q—I show you a document and ask if this is the lease you refer to?
(After proper identification the lease should be marked in evidence.)
- Q—I now direct your attention to clause numbered “third” in the lease, describing the demised premises, and ask if you occupied the entire premises therein described?
A—Yes.
- Q—Please describe the nature and extent of the premises.
- Q—Did you partly or entirely occupy these premises?
- Q—Thereafter did you have occasion to erect a sign upon any part of these premises?
- Q—Describe this sign as near as you can recall.
- Q—Upon what part of your premises did you erect this sign?
- Q—What, if anything, thereafter happened? A—The defendant, owner of the premises, tore it down, etc.
- Q—I show you a photograph and ask if it correctly and fairly represents the appearance of this sign at the time you installed same?
(Marked in evidence.)
-

The broad rule generally prevails that the leasing of a building, or part thereof, for business purposes, confers the implied right upon the lessee, in the absence of any agreement to the contrary, to use any portion of the outside walls for advertising purposes. *Broads v. Mead*, 159 Cal 765, 116 Pac 46, Ann Cas 1912C 1125; *Hillburn v. Huntsman*, 187 Ky 701, 220 SW 528; *Lowell v. Strahan*, 145 Mass 1, 12 NE 401; *Kretzer Realty Co. v. Thomas Cusack Co.* 196 Mo App 596, 190 SW 1011; *Blumenthal v. Kelsey*, 176 App Div 369, 162

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NY Supp 967; *Salinger v. North American Woolen Mills*, 70 W Va 151, 73 SE 312.

It is clear, however, that such right cannot be exercised so as to cause material injury to the premises, as by the erection of heavy advertising structures which may weaken the building or walls. *Snyder v. Kulesh*, 163 Iowa 748, 144 NW 306; *Hayman v. Rownd*, 82 Neb 598, 118 NW 328.

Nor does the right to erect advertising structures extend to the obscuring of any part of the premises not covered by the lease. *Booth v. Gaither*, 58 Ill App 263.

In evaluating the relative rights of a lessee of a ground floor and the owner occupant of the second floor, with respect to the use of the wall of the ground floor front for advertising purposes, one court stated: "Conceding, arguendo, that the landlord might use part of the space for the purpose of notifying his customers as to where he might be found, it does not follow that in so doing he might deprive his tenant of the reasonable use of the exposed walls or columns to advertise his own business. The sign which defendants proposed to have painted would not interfere with the landlord's use of it for any legitimate and proper purpose, and if it did we are not prepared to say on this record that plaintiff had a prior and superior right to the use of this column for the purpose of advertising his business. There was a sign over the entrance to the building notifying the public that the plaintiff was in business in that building, and the character thereof, and, while there is some testimony that defendants were not particular in directing customers to him, this did not deprive them of their right to a reasonable use of the building under their lease." *Snyder v. Kulesh*, 163 Iowa 748, 144 NW 306, Ann Cas 1916C 481.

Elsewhere it is stated that the lease of an entire floor "must carry with it the appurtenant right to exclude signs, advertising the business of persons other than the tenant, from those parts of the walls which form the inclosure of the floor. Some cases hold that the outer face of the wall is equally with the inner face a part of the premises demised." *Stahl & Jaeger v. Satenstein*, 233 NY 196, 135 NE 242, 22 ALR 798.

A stipulation in the lease which expressly or impliedly reserves to the landlord the right to use the walls of the leased premises for advertising purposes, will exclude any use by

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the tenant of the walls for his own purposes. *Fuller v. Rose*, 110 Mo App 344, 85 SW 931.

In the event the owner of the building had entered into a previous agreement with a third party conferring the right to use the walls of premises for advertising purposes, the lessee of such property takes subject to the agreement and may not prevent use of the property by such third person for advertising purposes. *Levy v. Louisville Gunning System*, 121 Ky 510, 89 SW 528, 1 LRA(NS) 359.

Similarly, it has been ruled that where the lessee of a ground floor store had maintained an advertising sign on the front of his premises for a considerable time prior to the execution of a lease for the second floor premises, the lessee of the latter might not enjoin the continued use of the advertising sign, notwithstanding a portion of such sign extended over upon the second story front. *Pevey v. Skinner*, 116 Mass 129.

As stated: "The plaintiff's lease was subsequent to that of the defendants. His right to use the outer surface of the wall was defined and thereby limited by the terms of his lease. Those terms were 'that the lessee may have the right to place signs upon the outer wall of said rooms.' It was a privilege, not an exclusive right. Prima facie, it was to be exercised in reference to the conditions of the premises at the time the lease was given. There is nothing to show that it could not be fully enjoyed without interference or obstruction from the sign of the defendants. If it could, then the grant of that privilege to the plaintiff cannot be construed as a revocation of the license to the defendants. The plaintiff, not having shown any right in himself to the space covered by the sign of the defendants, was not entitled to put them to the proof of any title thereto in their justification beyond that of their original license from the owner." *Pevey v. Skinner*, 116 Mass 129.

It may be noted that a tenant who has leased a specific portion of premises does not have the implied right to use the roof or any part thereof for advertising purposes. *O. J. Gude Co. v. Farley*, 28 Misc 184, 58 NY Supp 1036.

Accordingly, it has been ruled that a tenant of a store in a building may not enjoin the erection by a third party of an advertising sign on the roof of the structure, notwithstanding

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the close proximity between the roof and the ceiling of the leased premises. *MacNair v. Ames*, 29 RI 45, 68 Atl 950, 16 Ann Cas 1208.

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ADVERTISING MATTER, APPROPRIATION OF

(Action to restrain use of advertising slogan)

Q—You are the plaintiff in this action?

Q—In what business are you engaged? A—In the manufacture of nurses' uniforms.

Q—Under what name do you operate your business? A—The Clara Barton Nurses Apparel Co.

Q—What name is used in identifying your product? A—The Clara Barton uniform.

Q—How long have you used that name upon your uniform?

Q—Is there any other product you market under that name? (Explain inception of name; is it a registered tradename, of what date, etc.)

Q—Have you, during that period, had occasion to advertise your product in newspapers, magazines, or other publications?

Q—During the past year, in which newspapers and magazines has your product been advertised?

(Show extent to which the name has acquired familiarity with the general public.)

Q—Have you ever conducted any mail order campaigns?

Q—I show you this newspaper advertisement, and ask if that describes your uniform? A—It does.

(Is the name set forth in any distinctive manner, or using any peculiar layout?)

(The extent of advertising for past year should be shown.)

Q—I now show you this label, and ask if you recognize it as the label used upon your uniforms?

(Mark in evidence the label, newspaper, or any other advertising media, used to show the widespread use of plaintiff's name.)

Q—Now will you look at this newspaper advertisement, and tell this court and jury whether it represents your product? A—No.

Q—Did you insert this advertisement?

Q—Did you consent to the use of your name in connection therewith?

(All exhibits containing proof of the misuse of plaintiff's advertising should be marked in evidence.)

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Q—Now look at this tag and label, and tell this court and jury whether they represent your product?

(The proof should show any distinctive colorings, labels, wrappings or packaging, and the extent of imitation by defendant.)
(Testimony of purchaser.)

Q—Have you had occasion to wear a Clara Barton nurses' uniform?

Q—How long have you worn this uniform?

Q—Did you, during July 1942, order by mail a uniform described in this advertisement, plaintiff's exhibit A?

Q—Did you, at that time, intend to purchase a Clara Barton uniform?

Q—And what uniform did you receive?
(Purchaser in retail store.)

Q—Did you, on or about May 1, 1942, visit the Smith Department Store at 622 Main Street? A—Yes.

Q—Do you recall the purpose for which you visited this store?
A—To buy a nurses uniform.

Q—Did you intend purchasing any specific brand of uniform?
A—Clara Barton uniform.

Q—Did you ask for this product by name?

Q—As near as you can recall, will you tell us what you asked for. A—I asked for the Clara Barton nurses' uniform.

Q—Did you see this uniform advertised at any time, before that date?

Q—Where did you see this advertisement?

Q—Did you receive a uniform in the Smith store?

Q—Is this the uniform you received?
(Marked for identification.)

Q—Did you purchase this uniform?

Courts have generally accorded protection to the originators of advertising methods and techniques, provided certain basic requirements are fulfilled. The basic requirement of originality is essential, since a slogan, phrase or concept which has been copied from another, will not be recognized as constituting a property right in the person copying same. It must also appear that the matter forming the subject of the

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controversy is expressed in a tangible, physical form; the mere existence of an idea, inchoate and not reduced to physical expression, as a sign, slogan or writing, is not a property right recognizable at law. *Schulte v. Colorado Tire & Leather Co.* 170 CCA 524, 259 Fed 562; *Cady v. Schultz*, 19 RI 193, 32 Atl 915, 29 LRA 524; *Crump v. Lindsay*, 107 SE 679(Va) 17 ALR 747, 760.

It is generally held that appropriation of advertising matter does not, standing alone, constitute unfair competition, unless the copying is such that it induces the public to believe that in dealing with the appropriator they are securing the product of the originator. *Merchants Syndicate Catalog Co. v. Retailers Factory Catalog Co.* 206 Fed 545; *S. R. Feil Co. v. Robbins*, 220 Fed 650; *Westminster Laundry Co. v. Hesse Envelope Co.* 174 Mo App 238, 156 SW 767; *Elbs v. Rochester Egg Carrier Co.* 134 NY Supp 979; *Cady v. Schultz*, 19 RI 193, 32 Atl 915, 29 LRA 524.

"Undoubtedly, where two persons are engaged in selling like goods, neither of them has or can acquire the exclusive privilege to aptly designate and describe them, or to attractively present them for sale, with appropriate directions for their use." *Bickmore Gall Cure Co. v. Karns*, 134 Fed 834.

Thus, in discussing the last requirement, that the public must be misled by the advertising matter at issue, it was stated as follows: "The placing upon the market of a stove the design of which is copied from that of a rival manufacturer cannot be restrained as unfair competition, if the earlier design had been so recently produced that the public had not become familiar with it as designating the product of the designer, so as to be deceived into buying the copy as his, where the copyist uses his own name and trademark on his product, so that there is no attempt to palm it off as that of his rival." *Rathbone, S. & Co. v. Champion Steel Range Co.* 189 Fed 26, 110 CCA 596.

Elsewhere it is pointed out that "if you copy the advertisement of another you do him no wrong unless in so doing you lead the public to believe that you sell the articles of the person whose advertisement you copy." *Cobbett v. Woodward*, 41 (Eng) LJ Ch NS 656, 20 Week Rep 963.

The law does not prescribe the precise form in which the imitation must exist; it may take place in the wrappings, pack-

aging, labels, trademark, or trade names. As expressed in one instance:

“Unfair competition in trade is not confined to the imitation of a trademark, but takes as many forms as the ingenuity of man can devise. It may consist of the imitation of a sign, a tradename, a label, a wrapper, a package, or almost any other imitation by a business rival of some distinguishing earmark of an established business, which the court can see is calculated to mislead the public and lead purchasers into the belief they are buying the goods of the first manufacturer.” *Manitowoc Malting Co. v. Milwaukee Malt-ing Co.* 119 Wis 546, 97 NW 389.

In *Crump v. Lindsay*, 107 SE 679 (Va), it was pointed out: “Coming, then, to the specific rule constituting the doctrine of unfair competition in respect to the sale of vendible commodities, it may be stated as follows: independently of the existence of any technical trademark, no manufacturer or vendor will be permitted to so dress up his goods, by the use of names, marks, letter, labels, or wrappers, or by the adoption of any style, form, or color of packages, or by the combination of any or all of these indicia, as to cause purchasers to be deceived into buying his goods as and for the goods of another.”

“Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals.” *Coats v. Merrick Thread Co.* 149 US 566, 37 L ed 850.

The test propounded by the decisions discussing this subject is whether the work of the second manufacturer operates to create an impression or belief in the mind of the purchaser that it is the product of the first or original manufacturer that is being offered. *Baker v. Selden*, 101 US 99, 25 L ed 841.

Each case will obviously spin its own pattern of liability, according as the substance of the advertisement suggests the work of another. Similarity of design, the copying of words or phrases, use of same or similar color, and the nature of the layout, are all factors that must be carefully evaluated

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before a decision may be made. *Stevens Linen Works v. Don Co.* 121 Fed 173; *Potter Drug & Chemical Co. v. Pasfield Soap Co.* 102 Fed 493.

Thus, the mere fact that a phrase or two is copied, or that words are lifted verbatim, will not establish a cause of action, if such acts considered in relation to the advertisement as a whole do not operate to create the impression that the product of another is being offered. *Potter Drug & Chemical Co. v. Pasfield*, *ibid*.

In the case last cited, the court stated: "In the body of the complainant's circular are at least three sentences or paragraphs the very words of which have been transferred to the defendant's circular. This pilfering of language is obvious, but the circulars themselves are entirely unlike in appearance, size and usually unlike in matter, although there are similarities other than those to which attention has been called. Notwithstanding the unfavorable opinion that must attach to this act . . . yet it cannot be concluded that such act had any effect in misleading persons proposing to purchase complainant's soap."

The precise line of demarcation is frequently difficult to draw. The same difficulty is encountered in copyright actions. As stated: "We must take care to guard against two extremes equally prejudicial; the one, that men of ability who have employed their time for the service of the community may not be deprived of their just merits and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvement, nor the progress of the arts be retarded." *Sayre v. Moore*, 102 Eng Reprint 139.

Elsewhere this expression is found: "That which a court of equity will enjoin is unfair competition, but to hold that competing merchants having the right to sell similar goods may not use identical advertisements to commend them to the public notice, where there is neither fraudulent nor deceptive attempt to pass off the goods of the seller upon an unwary purchaser who desired to buy and thought he was buying the goods of another dealer, would be novel, extreme and unwise." *Crump v. Lindsay*, 107 SE 679 (Va).

It is unfair competition for a manufacturer of stove polish to imitate the blue label of another manufacturer of such product, by using the same color for his labels and an almost identical picture of a woman polishing a stove, and by using

the words "Stove Lacquer" in lieu of the words "Stove Lustre" on the earlier label. *Nekritz v. Klein*, 278 Fed 687.

The use of a red stripe or parallelogram, bearing the word "asperin," above which appears a red semicircle containing the letters "A. D. S.," as used on a box containing asperin tablets, is not, it is held in *Smith-Kline & F. Co. v. American Druggists Syndicate*, 273 Fed 84, an unfair imitation of a red band entirely encircling a box for asperin tablets, and bearing the letters, "S. K. & F.," printed diagonally thereon.

Too much reliance should not be placed on the abstraction of words or phrases alone, or for that matter, upon any single factor suggestive of copying or simulation. The advertisement should be viewed in its entirety, and its effect as a whole carefully studied. "Similarity . . . is enjoined as unfair competition, because customers, calling for an article, do not stop to read printed names and addresses, or to observe differences which may distinguish the simulated article from the one called for. They are satisfied with general appearances." *International Htg. Co. v. Oliver Oil, etc. Co.* 228 Fed 708.

In *Myles Standish Mfg. Co. v. Champion Spark Plug Co.* 282 Fed 961, it was held that where plaintiff had for many years furnished its product to the Ford Motor Company as factory equipment, and, by featuring this usage in its advertising, had created a popular conception of the value of its spark plugs, a competitor manufacturing a similar article would not be allowed to advertise its plugs as "standard spark plugs for Ford cars," since such expressions were calculated to make the ordinary purchaser think that such plugs were being used by the Ford Motor Company as factory equipment, a use confined solely to plaintiff's plugs.

It may therefore be stated that courts recognize a distinct property right in an original arrangement of advertising matter, as distinguished from the mere ideas and mental concepts. Thus, it is stated:

"Where the goods of a manufacturer have become popular not only because of their intrinsic worth, but also by reason of the ingenious, attractive, and persistent manner in which they have been advertised, the good will thus created is entitled to protection. The money invested in advertising is as much a part of the business as if invested in buildings or machinery, and a rival in business has no more right to use the one than the other,—no more right to use the

machinery by which the goods are placed on the market than the machinery which originally created them. No one should be permitted to step in at the eleventh hour and appropriate advantages resulting from years of toil on the part of another." *Hilson v. Foster*, 80 Fed 896.

As another court expressed the rule: "If one may copy and reproduce the goods of a rival manufacturer, and thus fairly compete with him for the public patronage in the sale of such goods, then competing merchants, both of whom have the unquestioned right to sell similar goods, may certainly, as incidental to such right to sell, reproduce all attractive advertising matter commending such goods to the trade in similar language, if such language is unprotected by copyright or otherwise. The ownership gives the right to sell, and in the public interest trade should be as far as possible left untrammelled. Manufacturers and dealers have the right to protect themselves from imitations by patents, trademarks, copyrights, and labels, and, while unfair competition and fraud should be and will be restrained in proper cases, no impediments to fair trade should be imposed by the courts, except for the protection of substantial rights which cannot be otherwise protected." *Crump v. Lindsay*, 107 SE 679 (Va).

In one frequently cited case, involving a comparison of the "Banquet Hall Boquet" cigar, with a product designated as the "Hoffman House Boquet," the court summarized the points of similarity in the following manner: "The defendants' advertising proceeds upon lines similar to those adopted by the complainant; every step taken by the latter is met by a similar step by the former. The complainant uses the name 'Hoffman,' the defendants use the same name though differently spelled. The complainant uses diamond-shaped silver and black price cards and red and gold bands; the defendants do the same. The complainant's show cards, posters, and labels represent a banquet scene in the dining room of the Hoffman House; the defendants produce a similar scene in the dining room of "The Waldorf." It is the use of metal signs, in the size and shape of the cigar, in the use of a picture representing a 'smoking man', in the color of the paper edging of the cigar box, and in many other matters of detail the defendants have trodden closely in the footsteps of the complainant. They have evolved nothing original; the plan of their advertising has been copied directly from the complain-

ant. It is true that many of these similarities are, when considered alone, immaterial and insignificant if, for instance, the complainant's right to relief depended upon the color of the bands and box binding, or the size and shape of the cigar, it would be the duty of the court to dismiss the bill as depending upon considerations too trivial and speculative to warrant the interference of a court of equity. The law is not made for the protection of degenerates and paranoiacs, but for the general public, composed of men with ordinary common sense and with faculties unimpaired. The task of the court therefore, will be accomplished if it confines its attention to those similarities which are likely to deceive the ordinary purchaser. Though many of the acts complained of are insufficient to sustain a decree when considered alone, they are all important as tending to establish the general design to poach upon the complainant's preserve at every point and help to established the intent of the defendants in their more open and flagrant infringements." *Hilson v. Foster*, 80 Fed 896.

A manufacturer that copies cuts of articles from a competitor's catalogue, as for example, cuts of hats, shoes, suits, etc., does not thereby expose himself to an action for unfair competition, unless the net effect is to deceive the prospective purchaser into the belief he is securing the product of another manufacturer. *Hamilton Mfg. Co. v. Tubbs Mfg. Co.* 216 Fed 401.

"The Tubbs Company's catalogue was issued for the purpose of advertising its goods by the sale of its manufactured articles, and, such being the fact, if it did copy from complainant's catalogue cuts of articles which it might sell as well as the complainant, it committed no offense of which the court can take cognizance." *Hamilton Mfg. Co. v. Tubbs Mfg. Co.* *ibid.*

It sometimes can be shown that use of a specific catch phrase is sufficient to create an illusion that the product of another party is being purchased. It is accordingly well settled that where one has adopted a catch phrase as a distinctive form of advertisement, which has by long and continued broadcast and publication to the general public, become to be associated with a specific manufacturer, he is entitled to protection against the use of such phrase by another. *Kimball v. Hall*, 87 Conn 563, 89 Atl 166, LRA1916E 632.

The proof should make clear the nature and extent of the

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copying, through adequate exhibits and sufficient proof as to the method of copying. Testimony of purchasers that they purchased the goods of the defendant, thinking the material was that manufactured by the plaintiff, may be introduced. The length of time the plaintiff's handiwork was in general circulation, the extent of advertising and public reliance thereupon, should all be fully developed at the trial.

AGENT, LIABILITY TO THIRD PERSON

Q—You are the plaintiff in this action?

Q—In what business are you engaged? A—In the lumber business.

Q—Did you, on or about June 7th, 1943, have any conversations with the defendant in this action? A—Yes.

Q—Do you recall the date of your first conversation with the defendant?

Q—Where was this conversation held?

Q—Now please tell the court and jury the substance of this conversation? A—I asked the defendant the price of certain lumber that he had offered me for sale, and then we set a date for delivery, etc.

Q—What statements or representations did the defendant make with respect to the ownership of this lumber? A—He told me it was owned by the Grady Lumber Corporation, his employer.

Q—To whom did you make payment for this lumber? A—To the Grady Lumber Corporation.

Q—Did you thereafter receive shipment of the lumber? A—No, it was taken off the freight car at the local siding.

Q—Do you know who took the lumber? A—Yes, the Otis Lumber Company, etc.

(The proof should be clear in establishing ownership in a third person at the time of the representation and sale.)

(Where the proof shows that a conversion was committed by the agent, as by selling property to which neither he nor his employer had title, the agent is personally liable to the prospective purchaser.)

It is generally agreed that an agent is liable to a third person for damages which result from the violation by the agent of a duty during the course of his employment, provided, however, that it is made clear such duty actually flows from the agent to the third person. This liability exists irrespective of whether the violation is one of misfeasance, malfeasance, or non-feasance. The Courts have, however, used these terms loosely so that the application of the rule depends in large part upon the peculiar facts of each case, rather than any abstract statement of law. Annotation: 99 ALR 408.

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As a general proposition the term "malfeasance" is referable to the performance of acts which ought never to have been committed and which are illegal by their very nature.

Thus, where a servant commits a trespass during the performance of his duty to his master, such servant is held liable notwithstanding he committed the act in the name of his principal. *Finnell v. Pitts*, 222 Ala 290, 132 So 2.

It has also been held that a servant is liable for false representation or acts of deceit or extortion which he commits while acting for his employer. *Harris v. Tams*, 258 NY 229, 179 NE 476; *Rogers v. Brummett*, 92 Okla 216, 220 Pac 362.

Thus it has been held that where a patent attorney fraudulently misrepresents the true facts about a patent to a prospective investor in order to secure sums of money, he is personally liable to the investor notwithstanding that the attorney acted as agent for the inventor. *Seestedt v. Jones*, 230 Mich 341, 202 NW 984.

The liability of an agent to a third person has been extended to misrepresentations made during the conduct of sales for the principal. Thus it has been held that an agent for a seller is liable for misrepresentation as to the value or condition of property about to be sold. *Rogers v. Brummett*, 92 Okla 216, 220 Pac 362.

This liability exists notwithstanding a clause in a contract of sale, stating that the purchaser has made personal inspection of the property, and that he is buying it solely as a result of his own investigation, without any representation by any one else. *Menking v. Larson*, 112 Neb 479, 199 NW 823.

An agent is also liable for acts of conversion which he commits alone, or in concert with his principal. This rule is illustrated by the holding that an agent of a principal who sells property of another for the principal, without authority from the owner, is personally liable in conversion, notwithstanding that he was ignorant of the true title to the property. *Semple v. Morganstern*, 97 Conn 402, 116 Atl 906.

Liability has also been extended to libels uttered by an agent of the owner of the instrumentality used in committing the libel. Thus a radio announcer who reads prepared material in a broadcast, is liable to the person thereby slandered. *Miles v. Lewis Wasmer*, 142 Wash 466, 20 Pac(2d) 847.

The rule which imposes liability upon an agent for acts of misfeasance, is stated as follows: "Misfeasance is a positive

wrong and means the improper doing of an act which the agent might lawfully do. It may also involve to some extent the idea of not doing; as where an agent engaged in the performance of an undertaking does not do something which it is his duty to do under the circumstances, or does not take precaution, or does not exercise that duty, which the duty to the right of another requires." *Coffey v. Bradshaw*, 46 Ga App 143, 167 SE 119.

This rule is illustrated in the holding that the agent of a principal who engages a 14 year old infant for employment in violation of a statute, is personally liable, in addition to the employer, for damages for injury to the infant. *Tosconi v. Litsky*, 5 NJ Mis R 100, 135 Atl 667.

It must be shown however in all cases of the character under discussion that the agent owed a specific duty to the third person. Thus it has been held:

"Though a third person suffer loss as a result of the agent failing to perform his duties to his principal, if that breach of duty to the principal is unaccompanied by any act or omission of the agent whereby a duty owing by him to the third person is breached, no course of action accrues in favor of the latter against the agent." *Knight v. Atlantic Coast Line R. R.* 73 Fed(2d) 76.

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ASSAULT AND BATTERY, ACTION FOR DAMAGES

Q—You are the plaintiff in this action?

Q—Are you the owner of premises 562 William Street, in the city of New York?

Q—Was the defendant in this case a tenant upon these premises on May 9th, 1943?

Q—And did you then own this property?

Q—Did you call upon the defendant on this date?

Q—What was the nature of your visit? A—I came to collect the rent due on May 1st.

Q—Did you have any conversations with the defendant at that time?

Q—Please describe these conversations.

(Describe in detail all conversation tending to lay a basis for the assault, or which may characterize the motives of the defendant.)

Q—What, if anything, happened during the course of that conversation? A—The defendant punched me in the face and pushed me down the stairs, etc.

Q—Where were you standing at that time?

Q—Where was the defendant standing at that time?

Q—Can you recall any remarks or statements made by the defendant immediately preceding the acts you have just described?

Q—How soon before the actual assault were those remarks made?

Q—What happened to you after you were pushed down the stairs?

(Did the defendant utter any defamatory statements, make further threats, or commit further acts of assault; explain in detail.)

Q—Who was present at the time the defendant committed these acts?

(Did the defendant injure any person other than the plaintiff?)

Q—When was the last time prior to May 9th, 1943, that you saw the defendant?

Q—Explain the circumstances of that meeting?

(Were any threats uttered by the defendant; if so, they may be shown provided they are related to the acts of assault at issue, as for example, if the defendant threatened physical injury if demand was made for rent.)

The proof in actions for simple assault revolves in large measure upon the question of intent. It is essential in civil actions to recover damages for such an assault to establish the intent to do harm; unless the plaintiff can establish this essential element, no cause of action is made out. *State v. Baker*, 20 RI 275, 38 A 653; *Raefeldt v. Koenig*, 152 Wis 459, 140 NW 56.

It is stated by some courts that an actionable assault may be predicated upon either an actual intent to commit acts of violence, or by a course of conduct which creates in the mind of the victim a well-grounded belief that a physical assault is about to take place. See *American Law Restatement, Torts*, 32.

Where the action is based upon an assault and battery, the intent of the defendant is not a material factor, provided the acts complained of are wrongful in character. This rule is based upon the theory that if the acts were in themselves wrongful, the intent of the actor must be presumed to have been wrongful. *Ibid*.

Local statutes define in many instances what constitutes an assault, and the elements thereof; these should be carefully studied in the light of the facts and circumstances in each case.

The distinction should be noted between an assault and battery. An assault may be committed without an actual laying upon of the hands of the person committing the offense, while a battery is characterized by a definite and clear-cut physical encounter or contact. *Seigel v. Long*, 169 Ala 79, 53 So 753.

Counsel for the plaintiff should examine carefully into all the surrounding facts and circumstances to see that he has joined as defendants all those who directly or indirectly participated in the assault. It is well to bear in mind that liability is not restricted to those who actually commit the assault, as by inflicting the injury, but all persons who by words, looks, gestures or signs aided or encouraged in the consummation of the assault. A person who takes it upon himself to so par-

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ticipate in an unlawful act is assumed to have legally taken part therein, at least to the extent that he is legally liable for the consequences. *Brink v. Purnell*, 162 Mich 147, 127 NW 322; *Perrine v. Hanacik*, 40 Okla 359, 138 P 148; *Wooden v. Com.* 117 Va 930, 86 SE 305.

At the same time, counsel should not assume that mere presence, without any overt act calculated to constitute participation, will justify making a person party defendant. It has been held that mental approval of an assault, and failure to take any steps to mitigate the acts constituting such assault even though this power existed and could have been exercised, will not impose liability. *Brink v. Purnell*, 162 Mich 147, 127 NW 322; *Walker v. Kellar*, 226 SW 796 (Tex Civ App).

Plaintiff's counsel should be alert to any attempt by the defendant to bring out that a defendant is presumed innocent of a crime, such as an assault, until proven guilty beyond a reasonable doubt. This presumption is obviously applicable to criminal prosecutions exclusively, and has no application to a civil action to recover damages for an assault. *Kurz v. Doerr*, 180 NY 88, 72 NE 926.

The burden of proof is upon the plaintiff with respect to establishing the elements of the assault, and in the event a plea of justification is made the defendant must assume the burden of establishing such plea. *Morris v. McClellan*, 154 Ala 639, 45 So 641.

The plaintiff should be careful to develop in his proof all surrounding facts and circumstances indicative of intent, ability to commit the assault, identity of assailant, and the character of the assault itself. For example, counsel should develop in detail any intoxication of a defendant, his appearance, any oral threats that preceded the actual assault, any injuries inflicted upon third persons while committing the assault upon the plaintiff, and the nature of any remarks made by the defendant during the commission of the offense.

The defendant should overlook no detail that will establish provocation or justification. He may show any facts which tend to establish that he acted without malicious intent. Did the plaintiff strike the first blow, or make a threat which justified the belief a physical attack was about to occur? *McCulloch v. Goodrich*, 105 Kan 1, 181 Pac 556.

The plaintiff should be careful to note that any evidence of provocation is *directly related to the assault at issue*; both in

point of time and subject matter. Facts which have no logical connection with the assault in question, or are so remote therefrom as to form no relationship, are clearly inadmissible. *Keiser v. Smith*, 71 Ala 481, 46 Am Rep 342.

It is also well for the plaintiff to be prepared to show in a proper case that acts of alleged justification were not proportioned to the threats or physical acts of the plaintiff.

Threats made by the defendant are generally abmissible, even though uttered prior to the assault constituting the basis of the action, provided the plaintiff establishes their relevancy and direct connection to the motives or events characterizing the assault at issue.

In one case the court held that it is not necessary to show that the threats were made against the plaintiff alone; it is sufficient if the threats were made generally and could have, by implication or otherwise, have included the plaintiff. *Conklin v. Consolidated R. Co.* 196 Mass 302.

In developing the damages sustained, counsel should not confine himself to the physical aspects alone. He may show in full any elements of humiliation or disgrace brought about by vile threats or oral abuse by the defendant during the assault, or immediately preceding, or following, the same.

The defendant may show that the plaintiff was negligent in failing to take steps or measures available to him, to mitigate or reduce the damages or injuries sustained, as by omitting to secure medical treatment while the same was indicated by the nature of the injuries. *Macdougall v. Maguire*, 35 Cal 274, 95 Am Dec 98.

Evidence of character and general reputation ordinarily has no place in a trial for damages based upon an assault; either to show the good character of the defendant or bad reputation of the plaintiff. *Noonan v. Luther*, 206 NY 105, 99 NE 178.

It is well to be fully prepared with competent medical testimony as to the nature and extent of the injuries sustained, as well as the effects thereof. The medical witness should be asked whether the acts testified to by the plaintiff, and alleged to constitute the assault, *could have* operated to bring about the injuries in question; e. g. could such physical acts produce the specific injuries complained of by the plaintiff. As a corollary of this inquiry, the witness should be asked

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whether he has an opinion that he can state with reasonable certainty as to whether the assault at issue *did* produce the injuries described. See Schweitzer's Trial Manual for Negligence Actions, Chapter X for a full discussion of medical testimony.

Exemplary damages are recognized by most jurisdictions as proper in the case of an assault and battery committed wantonly or maliciously, and under such circumstances as would justify punitive damages. *Norfolk & P. Traction Co. v. Miller*, 174 Fed 607, 98 CCA 453; *Empire Clothing Co. v. Hammons*, 17 Ala App 60, 81 So 838; *Barlow v. Lowder*, 35 Ark 492; *Distin v. Bradley*, 83 Conn 466, 76 Atl 991; *Webb v. Brown*, 63 Fla 306, 58 So 27; *Kelly v. Sanderson*, 204 Ill App 155; *Dahlsie v. Hallenberg*, 143 Minn 234, 173 NW 433; *Genung v. Baldwin*, 77 NY Supp 679, 75 App Div 195, reversed on other grounds in 77 NY Supp 679; *Wilmot v. Bartlett*, 37 RI 568, 94 Atl 427. See also 16 ALR 775.

"Where in an action for assault and battery, there is evidence tending to show that the defendant acted with malice toward the plaintiff, or with reckless and wanton disregard of the rights of the plaintiff, it is proper to instruct the jury that if they believe that the defendant did so act, they may, in their discretion, award damages in excess of that which would compensate the plaintiff for his injury, as a punishment to deter the defendant and others from the commission of like offenses." *Pendleton v. Norfolk & Western Railway Co.* 82 W Va 270, 95 SE 941.

"It is fully settled by the decisions of this court that in actions for torts, where there has been fraud, malice, or oppression on the part of the defendant, the jury may allow what are denominated exemplary or punitive damages,—that is, damages beyond the mere pecuniary loss or injury to the plaintiff, and intended as in some measure a punishment upon the defendant for the wrong done, and as an example to deter others from similar acts." *Boetcher v. Staples*, 27 Minn 308, 7 NW 263.

The rule is also stated as follows:

"When the plaintiff shows that the attack upon him was wanton or malicious, without any provocation, and the wrong inflicted was grievous, the jury may give him damages without reference to actual injury, but by way of punishment and

example. Such damages are in the reasonable discretion of the jury, in view of all facts and circumstances proved. When thus given they are not mere compensation to the plaintiff, but are called punitive, vindictive, or exemplary, and are by way of public example or punishment. In estimating these damages, the jury may take into account, and should consider the circumstances of time and place of the attack, the mode of making it, the insult to the plaintiff, his suffering of body and mind, and any other fact enhancing the injury of the plaintiff, and they may consider the pecuniary means of the defendant in awarding them." See 16 ALR 781.

In one instance, the following charge was approved by an appellate court:

"It is a rule, in a case of this kind, that, when an assault is wanton, unprovoked, causeless, with a desire to hurt, to gratify anger or malice, the jury, if they think the actual damages awarded are not sufficient punishment, are warranted in adding to the actual damages such a sum as smart money, or punitive damages, which, taken together with the actual damages, will afford a sufficient punishment to the person who has done the wrong; juries are not compelled to do this; they are not required to do it; they are allowed to do it. Whether they will add punitive damages or not is left solely to the discretion of the jury. You have a right in this case, if you find that this was a wanton, wicked assault, not provoked by the plaintiff himself, to add to the actual damages a sufficient sum of money as punitive damages to afford sufficient punishment, provided the actual damages themselves are not sufficient. Otherwise not." *Brann v. Leavitt*, 117 Me 144, 103 Atl 12.

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ASSAULT UPON FEMALE, CIVIL ACTION

(Action for assault committed during attempt
at ravishment of female)

Q—You are the plaintiff in this action?

Q—How old are you?

Q—Do you recall the 10th day of July, 1942?

Q—Were you in the vicinity of the Fairview Fair Grounds
on that day?

Q—At what time of the day were you there?

Q—Do you recall whether you saw the defendant there at
that time?

Q—Where was the defendant where you first saw him?

Q—Now will you please tell this court and jury what, if any-
thing, happened to you at that time?

(Narrate in detail the attack, and all circumstances leading up
thereto, or explanatory thereof.)

Q—Describe the appearance of the plaintiff at the time this
happened?

(Was he disrobed; what in his appearance suggested the intent
to ravish the plaintiff?)

Q—What, if anything, did he say to you before, or during,
this attack?

Q—And what did you say to the defendant?

Q—I show you a photograph of the parking grounds of the
Fairview Fair Grounds and ask if you can identify it as
a reasonable likeness of the same?

(Mark photograph in evidence, after plaintiff has established
her familiarity with scene, and the accuracy of the photograph.)

Q—Will you now indicate upon this photograph the place
where the defendant was when you first saw him?

Q—Now indicate where the attack took place.

Q—Where did you go after this occurrence?

(Whom did plaintiff tell and how soon thereafter.)

(Show the appearance of the plaintiff immediately after the
attack, through the testimony of witnesses who saw her at that
time.)

(Proof of physical injuries may be made in same manner as in
negligence actions generally. See in this connection, "Trial
Manual for Negligence Actions.")

The rule is well settled that a person who commits an assault and battery upon a female person is liable for damages; this assault may be committed by an unlawful touching of her person, regardless of the degree of force or violence used, or the fact that the act is not wilful. *Hardeman v. Williams*, 150 Ala 415, 43 So 726; *Hageman v. Vanderdoes*, 15 Ariz 312, 138 Pac 1053; *Pine Bluff etc. R. Co. v. Washington*, 116 Ark 179, 172 SW 872; *Lind v. Closs*, 88 Cal 6, 25 Pac 972; *Clark v. Aldenhoven*, 26 Colo App 501, 143 Pac 267; *Brown v. Wheeler*, 18 Conn 199; *Hull v. Bartlett*, 49 Conn 64; *Suggs v. Anderson*, 12 Ga 461; *Labonte v. Davidson*, 31 Idaho 644, 175 Pac 588; *Hidden v. Baker*, 190 Ill App 561; *Smith v. Wickard*, 42 Ind App 508, 85 NE 1030; *Lutterman v. Romey*, 143 Iowa 233, 121 NW 1040; *Lonergan v. Small*, 81 Kan 48, 105 Pac 27, 25 LRA(NS) 976; *Flint v. Bruce*, 68 Me 183; *Thillman v. Neal*, 88 Md 525, 42 Atl 242; *Dix v. Martin*, 171 Mo App 266, 157 SW 133; *Kast v. Link*, 90 Neb 25, 132 NW 717; *Galvin v. Starin*, 132 App Div 577, 116 NY Supp 919; *Dornsife v. Ralson*, 55 Or 254, 97 Pac 882; Annotation: 6 ALR 987.

The proof should be clear in establishing that the act was without the consent of the woman, either implied or express. Thus, where it appears that the defendant kissed the plaintiff, with her consent, and thereupon was led to further acts, no cause of action can be made out, upon the theory that the plaintiff is not entirely blameless for the consequences of her acts. *Wright v. Starr*, 179 Pac 877 (Nev), 6 ALR 981.

It is also essential that the evidence establish the actual acts of violence, as distinguished from an empty threat, or a course of conduct constituting a vague threat. Thus, the mere locking of a door in a room occupied by a woman, or the obstructing of the means of egress and ingress, will not, standing alone, constitute an assault. *Patterson v. Pillans*, 43 App DC 505.

But it is not essential that the hand or other part of the body of the defendant actually come in physical contact with the woman, it is sufficient if he sets in motion the agencies causing the assault. Thus, an action may be made out by proof that the defendant spit in the woman's face, or that he threw water upon her. *Draper v. Baker*, 61 Wis 450, 21 NW 527; *Simpson v. Morris*, 128 Eng Rep 555.

It is not, of course, essential that the woman sustain physi-

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cal injury, or bear any outward evidence of the assault. This rule is illustrated in the holding that where a person snatches an object from a woman, the act constitutes a technical assault, notwithstanding the complete absence of any physical injury. *Dyk v. De Young*, 133 Ill 82, 24 NE 520.

While it is true that recovery cannot be had for mental suffering, in the absence of physical injury, where the action is grounded in negligence, it is held that for a wilful injury a recovery for mental suffering is possible, notwithstanding the absence of physical harm. *Kline v. Kline*, 158 Ind 602, 64 NE 9.

In *Hickey v. Welch*, 91 Mo App 4, the court pointed out:

"When a nervous disorder, acute or chronic, or an illness such as reputable physicians recognize as a genuine disease and can trace with reasonable certainty to its true cause, follows an unlawful act, no sound reason can be given why the party injured should not be compensated in damages, although there was no visible hurt at the time. Why should the fact that the sufferer was frightened cut him off from redress? Fright is itself a result of an agitation or shock to the nervous system, and when this shock is severe enough, it produces more than fright; namely, an impairment of health in some form or other, and more or less serious. All emotions are due to minute physical changes in the nervous system, and when the change resulting from the shock is extensive, it sometimes induces disease. The suffering thus occasioned is as much due to physical injury as that which results from an open wound on the surface of the body."

Similarly, in *Lonergan v. Small*, 81 Kan 48, 105 Pac 28, the court stated:

"There are well-organized exceptions to the general rule making a contemporaneous bodily injury essential to a recovery of damages, and among them may be mentioned assault, illegal arrest, malicious prosecution, false imprisonment, and seduction. While there is some diversity of judicial opinion on some of the exceptions to the rule and the grounds on which they rest, there is general concurrence in the view that the rule has no application to wilful and wanton wrongs and those committed with the intention of causing mental distress and injured feelings."

According to some decisions, it constitutes an assault upon a woman to threaten her with violence, and to show the pre-

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sent mean of carrying out the threats. *Townsdin v. Nutt*, 19 Kan 282.

Thus, it has been held actionable for a man to shake his fist in the face of a woman and threaten her with bodily violence. *Mitchell v. Mitchell*, 45 Minn 50, 47 NW 308.

Similarly, raising a stick to a woman, and assuming a menacing attitude, may constitute an assault. *Morgan v. O'Daniel*, 21 Ky L Rep 1044, 53 SW 1040.

The act of pointing a pistol at a woman may constitute an assault. *Winston v. Terrace*, 78 Wash 146, 138 Pac 673.

At the same time, however, it should be noted that fright when unaccompanied by any immediate physical injury to the woman, cannot be made the basis for the recovery of damages for a result which could not have been contemplated by the wrongdoer. *Nelson v. Crawford*, 122 Mich 466, 81 NW 335, 80 Am St Rep 577.

Thus, a man who playfully and with no malicious intent, frightens a woman, thereby causing her injury, cannot be said to have committed an actionable assault. *Ibid*.

A threat conveyed over the telephone cannot be made the basis for an action in assault. "The fact that the words were spoken over the telephone line would, of itself quite negative the theory of assault." *Kramer v. Ricksmeier*, 159 Iowa 48, 139 NW 1091.

Merely soliciting a woman to sexual intercourse is not the basis for an action in assault. *Prince v. Ridge*, 32 Misc 666, 66 NY Supp 454.

In *Reed v. Maley*, 115 Ky 816, 62 LRA 900, 74 SW 1079, 2 Ann Cas 453, the facts were that a woman was sitting near a window in her house, and the defendant came up near to the window and solicited sexual intercourse with her. This was held not to constitute an assault, although the result was greatly to excite her, there being no averment that the defendant entered her house, or was in reach of her so as to put her in fear.

But in *Leach v. Leach*, 11 Tex Civ App 699, 33 SW 703, involving an attempt to secure carnal intercourse with plaintiff, it was held that a wilful violator of woman's most sacred right of personal security, though her body be not touched except by his foul breath and speech, should respond in dam-

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ages for an outrage to her feelings which proceeds so directly from his concurrent criminal purpose and act.

Nor will such an action lie merely because such solicitation results in a willingness on the part of the woman to prepare herself for the act of physical intercourse, and upon repeated persuasion, to actually consummate the act. *Davis v. Richardson*, 76 Ark 348, 89 SW 318.

A man that partially disrobes and, in the presence of a woman, exposes his private parts, indicating an intention to have sexual intercourse with her, may be subject to an action in assault. *Alexander v. Blodgett*, 44 Vt 476; see also *Parker v. Couture*, 63 Vt 449, 21 Atl 1102.

It would seem clear beyond all doubt that where the defendant comes into physical contact with the plaintiff by taking improper familiarities with her against her consent, he is guilty of an assault and battery upon her although she suffers no physical injury therefrom. The injury resulting from fear, shame, and humiliation is sufficient to entitle the plaintiff to recover substantial damages for the assault. See cases collected in 6 ALR 995.

Excessive or improper force employed toward a woman will constitute an assault and battery upon her, notwithstanding that the act would have been lawful if excessive or improper force had not been used. *Fitch v. Huff*, 218 Fed 17; *Singer Sewing Machine Co. v. Methvin*, 184 Ala 554, 63 So 997; *Riffel v. Letts*, 31 Cal App 426, 160 Pac 845; *Hammond v. Hightower*, 82 Ga 290, 9 SE 1101; *Hitselberger v. Kanter*, 181 Ill App 459; *Singer Sewing Machine Co. v. Phipps*, 49 Ind App 116, 94 NE 793; *Biggs v. Seufferlein*, 164 Iowa 241, 145 NW 507; *McDermott v. American Brewing Co.* 105 La 124, 29 So 498; *McKeon v. Taylor*, 132 NY Supp 445.

Thus, where a woman attacks a man, and the latter repels the attack, he is not guilty of an assault and battery or liable to civil suit therefor; but where excessive force is used in repelling such attack, liability may accrue. *Drinkhorn v. Bubel*, 85 Mich 532, 48 NW 710.

A man is not justified in committing an assault and battery upon a woman because she called him a liar. *Gungrich v. Anderson*, 189 Mich 144, 155 NW 379.

And the fact that the plaintiff was using towards the de-

fendant's wife uncivil language will not justify him in using violence towards her. *Hubbard v. Perlie*, 25 App DC 477.

Nor is a man justified in using violence toward a woman, although she has been talking about him and his wife. *Suggs v. Anderson*, 12 Ga 461.

The burden of proof is upon the plaintiff in actions of this character, and the evidence presented should be clear in establishing the essential factors. *List v. Miner*, 74 Conn 50, 49 Atl 856; *Gorum v. Henry*, 138 La 596, 70 So 526; *Schenk v. Dunkelow*, 70 Mich 89, 37 NW 886; *Wright v. Grant*, '6 NYS Rep 362.

The proof should make clear the physical appearance of the plaintiff immediately after the attack, and the nature of any physical injuries sustained. Any conversations between the parties bearing upon the essential factors in the case should be proven.

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ATTORNEY, PERSONAL LIABILITY

(Action by appraiser for fee)

Q—You are the plaintiff in this action?

Q—What is your occupation? A—I am a licensed appraiser.

Q—How long have you been engaged in this work?

Q—Did you have any conversations with the defendant in this action during the month of May, 1944, relative to certain appraising work?

Q—Do you recall the exact date?

Q—Where were these conversations held?

Q—Please tell this court and jury the substance of these conversations. A—The defendant asked me to appraise certain property located at 187 Baynes Street, in this city, and I agreed to make such appraisal.

Q—What fee, if any, did you and the defendant agree upon?

Q—Did you perform this work?

Q—Please tell us exactly what you did. A—I visited the premises, and while there made an appraisal of the following property, etc.

Q—When was this work done?

Q—During the course of your conversations with the defendant, was any mention made of the owners of the property?

Q—Were you informed of any pending litigation?

Q—Did you receive orders from any person other than the defendant respecting the work you had done?

Q—Did you, at any time, have any conversations with any person other than the defendant, relative to such work?
A—No.

(Show nonpayment of fee after due demand.)

(No liability is incurred by an attorney for the fees and expenses of witnesses whom he calls in behalf of his client.)

(Action by sheriff.)

(After preliminary questioning.)

Q—From whom did you receive this document? A—From the defendant.

Q—On what date?

Q—Specifically, what request was made of you at that time?

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Q—Is that work within the line of your official duties as sheriff's aide?

Q—Did you perform this work?

Q—On what date?

(Show nonpayment of charge, which should be established as the official rate or customary fee.)

The broad rule seems well settled that an attorney who acts as agent for his client in entering into a contract, is not thereby rendered personally liable, unless of course, an express agreement to that effect is made. *American Appraisal Co. v. Pio*, 246 Ill App 467; *Doughty v. Paige*, 48 Iowa 483; *Mendenhall v. Sherman*, 193 Mo App 684, 187 SW 271; *Judson v. Gray*, 11 NY 408; *Sanders v. Riddick*, 127 Tenn 701, 156 SW 464; *Wires v. Briggs*, 5 Vt 101, 26 Am Dec 284.

The fact that the third person knew the attorney was acting as agent for another, and was not contracting in his personal capacity, is not conclusive. *Right Printing Co. v. Stevens*, 107 Vt 359, 179 A 209.

Thus, it was stated that "Even where the principal is disclosed, a contract may be made by an agent with a third person in such terms that he, the agent, is personally liable for its fulfillment. Whether this is so is largely a question of intention to be determined by the language of the contract, with reference to its subject matter and the contemporaneous circumstances." *Ibid*.

It has been held that where an attorney contracts for the printing of briefs and arguments upon appeal, he acts as his own principal and will become liable for the expense thereof, unless he specifically states that the work is being done for the clients, and that he is merely acting as agent. *Trimmier v. Thomson*, 41 SC 125, 19 SE 291.

It has also been held that where an attorney engages an appraiser to evaluate certain property, without disclosing to the appraiser the name of his clients, that the attorney is personally liable for the fee of the appraiser, but that where the names of the clients are fully disclosed, no personal liability exists. *American Appraisal Co. v. Pio*, 246 Ill App 467.

It is always necessary to scrutinize the facts and circumstances of each case, and the relationship existing at the time of the making of the contract between the various parties in-

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volved. Custom and practice may prove a material factor in some instances, to be carefully evaluated in connection with the other circumstances. Thus, it is possible for an attorney to render himself personally liable for the cost of a bail bond that he requests himself on behalf of a client, or for stenographers' charges incurred in the course of a proceeding where he personally orders the stenographic work, or for services of assistant counsel or private detective. *Cameron Sun v. McAnaw*, 72 Mo App 196; *Batavia Times Pub. Co. v. Hall*, 129 Misc 197, 221 NY Supp 89; *O'Malley v. Lewis*, 176 Wash 194, 28 P(2d) 283.

In one instance, the court held an attorney liable for the payment of an expert's witness fees, where the attorney summoned the expert and personally made all arrangements for his appearance in court, and where it further appeared that the attorney had a personal financial interest in the result of the trial. *Pessano v. Eyre*, 13 Pa Super 157.

It is clear that where the attorney acts for an undisclosed principal, he is personally liable on the contract that he enters into. *Gray v. Journal of Finance Pub. Co.* 2 Misc 260, 21 NY Supp 967.

This rule has been applied so as to hold an attorney liable for the fees of an expert witness where the name or identity of the client is undisclosed, and for printing expenses on briefs. *Ross v. Niles*, 84 NY Supp 142; *Batavia Times Pub. Co. v. Hall*, *Ibid*.

It should be noted that many decisions hold an attorney personally liable for the fees of a sheriff, marshal, court clerk or constable, where he personally delivers the papers of process to the official and makes request for specific performance of an official act. *Heath v. Bates*, 49 Conn 342, 44 Am Rep 234; *Tilton v. Wright*, 74 Me 214, 43 Am Rep 578; *Campbell v. Cothran*, 56 NY 279.

But there are other decisions holding that an attorney is not liable, in the absence of special circumstances establishing a contrary intention, for fees incurred by public officers in connection with public documents or public acts. *Doughty v. Paige*, 48 Iowa 483; *Preston v. Preston*, 1 Dougl (Mich) 292; see also 100 ALR 542.

In this connection, it has been aptly stated:

"Every just principle requires that a sheriff should give an

attorney reasonable notice of expenses incurred in the service of a writ. This is necessary that the expenses may be included in the taxed costs. The attorney should be informed of them also for his own safety and security. Though the attorney makes himself personally liable for expenses, yet his liability is not on his own account, or for his own benefit, but on behalf and on account of his client. He stands somewhat in the situation of a guarantor, and should know the extent of his liability, in order that he may look to his principal for indemnity. The officer being requested to make return of his doings, the attorney may reasonably expect to be informed of what the officer has done, and for which he has claims, without going to him personally and particularly to inquire. Where there are constantly increasing expenses, it is most reasonable and important that the attorney should have notice of them in order that he may determine whether or not he will continue to be liable, and that he may have opportunity to obtain indemnity from his client." *Tarbell v. Dickinson*, 3 Cush (Mass) 345.

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ATTORNEY, ACTION FOR VALUE OF SERVICES

(Action by attorney for executor to recover amount of fee)

Q—What is your occupation? A—I am an attorney at law.

Q—How long have you practiced law?

Q—During that time have you practiced any specialized phase of law? A—I handled probate and estate matter exclusively.

Q—For how many years did you practice this specialty?

(Develop any unusual qualifications which will tend to fix the professional standing of plaintiff; as law review articles appearing under his name, law school connections, nature of clientele, etc.)

Q—Were you engaged by the defendant in this action to probate the will of the late John Williams?

Q—On what date were you first consulted in that connection?

Q—Did you at that time make a record book of the progress of this matter?

Q—Did you enter in this book all services rendered by yourself to the estate?

Q—Did anyone beside yourself make entries in this book?

Q—Where was this book kept?

Q—I show you what purports to be a record book and ask if this is the volume to which you refer?

(Marked in evidence as plaintiff's exhibit.)

Q—For how long a period did you continue to represent this estate?

Q—And during that period of time you kept a record in this book of all developments in the estate?

Q—Have you an independent recollection as to the number of hours you spent in conference with the defendant, as executor of the estate? A—No.

Q—Please look at this book and see whether it refreshes your recollection upon that point.

(Continue with all other pertinent matters, such as telephone calls, papers drawn, briefs filed, etc.)

(Testimony of expert witness, as to value of services rendered.)

Q—What is your occupation? A—Attorney at law.

Q—How long have you practiced law?

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Q—Were you at one time a member of the judiciary? A—Yes, I was Surrogate of Orleans County for six years.

Q—You heard the testimony of the plaintiff?

Q—So that you are reasonably familiar with the nature and extent of the services he rendered as attorney to the executor?

Q—Are you able to state, with reasonable certainty, the value of the legal services rendered by the plaintiff?

Q—Will you so state.

Questions relating to recovery of attorney's fees are essentially factual in character, depending upon the facts and circumstances of each case. As has been well stated: "The learning and ability of the counsel, the means of the client, the magnitude of the interests involved, the hazards of the litigation, and the final result, whether successful or otherwise, as well as the actual time and labor expended for the client, all are or may be elements to be considered in determining what is reasonable compensation in a given case." *Halaska v. Cotzhausen*, 52 Wis 624, 9 NW 401. Annotation: 9 ALR 236.

Counsel should address his proof, therefore, to such factors as his standing in the profession, showing the length of service, the degree of specialization, any unusual attainments, and all factors indicative of high or specialized ability. Where the matter in which the services were rendered is of an intricate character, not understandable to the general practitioner, and calling for specialized knowledge, the proof should be detailed in showing the full extent of any specialized knowledge on the part of the plaintiff.

This factor has been shown by the testimony of qualified observers, such as members of the bar or bench, or by writings of the plaintiff evidencing the special knowledge and training that he seeks to establish.

It is also important to be prepared with proof of the nature of the litigation in which the services were rendered, in order to show the necessity for specialized knowledge or prolonged attention and labor expended upon the same.

To what extent were the questions involved complex, unusual, or such as the average lawyer is unable to formulate without summoning specialized assistance? How frequently

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does the average lawyer encounter questions such as those presented in the matter in which the services were rendered? How often does this question appear in the reported decisions? What authority is available as a guide? Is the problem one which can be little aided by precedent, and which requires original thought and reasoning on the part of counsel? The more clearly that counsel develops any unique angles of the situation, and shows the complexity inherent in the case, the more readily will he tend to establish a plausible justification for the services rendered and the fee asked.

How large an amount is involved? What is the precise nature of the responsibility that devolved upon the attorney? It is reasonable to assume that a jury will find more justification for long hours of service in solving a problem where its solution is attended with serious consequences to his client. A matter that involves a relatively small sum, or whose decision one way or another is of little moment to his client, is obviously not of such character as will justify the same degree of attention required in a case involving large sums of money.

Clark v. Ellsworth, 104 Iowa 442, 73 NW 1023. In this case the court aptly stated:

"It is a well-settled rule that the importance of the litigation, the success attained, and the benefit which it secured may be considered in estimating the compensation to which the attorney who conducted it is entitled for the services he rendered. The responsibility of an attorney may be, and usually is, much greater where large interests are involved than it is where the interests are of but little importance."

Attention is also directed to Gilmore v. McBride, 156 Fed 464, where the court held:

"In determining the reasonable value of services rendered by an attorney, it is certainly proper to consider the value of the property in litigation, and the consequent pecuniary benefit realized by the client as the result of the attorney's skill and labor. We do not agree with the plaintiff in error that such evidence should be confined to the date of the rendition of the judgment in which the property was recovered, but the inquiry may take a wider range, and include its value at the time of the trial, if still owned by the defendant. In other words, in such a case, the present value of the property recovered is not too remote for the consideration of the jury.

It tends to show the benefit which the defendant has actually received as the result of the attorney's services,—an inquiry which we think is always open, so long as the amount of the fee remains to be settled.”

In *Smith v. Chicago, etc. R. Co.* 60 Iowa 515, 15 NW 291, the court observed:

“In cases of great magnitude, not only is the responsibility greater, but the resistance is always more formidable than in cases where less is involved. The world knows that in a case of this kind, where a tract of land worth less than \$500 is involved, the contest would not be so vigorous on either side as in a case wherein the contest is for land in Chicago, worth one or two millions of dollars. We are authorized to say that under the general custom of the profession, values in controversy always control charges for professional services.”

The magnitude of the problem, and the nature of the responsibility undertaken, is particularly pertinent in situations where the attorney takes a case on a contingent basis. *Smith v. Couch*, 117 Mo App 267, 92 SW 1143, holding “where an attorney undertakes a case upon the understanding that unless he succeeds and accomplishes for his client what he has agreed to do, he is not to have any compensation for his services, the value of the magnitude of the result achieved ought to be considered in estimating the value of such services.”

The outcome of the case should be subject to proof, not that a successful culmination is essential to recovery of counsel fees, but as explanatory of the value of the work expended, the standing of counsel, and the time spent on the case. *Randall v. Packard*, 142 NY 47, 36 NE 823, where the court stated:

“The reason why the result is one of the important factors in the consideration must be obvious. It not only is some evidence of the usefulness of the services, but, for its effects upon the situation of the client, relatively to what it had been, it must be conceded a degree of influence in fixing the amount of the attorney's compensation, proportioned to the nature and incidents of the result, in connection with the other considerations.”

Of utmost importance is detailed proof as to the number of hours spent in handling the case, the conferences held, number

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of letters written, telephone calls made, visits to court or to client, interviews at office, papers drawn, briefs compiled, and other pertinent detail. Where such matter is contained in a docket book, or in a series of letters or memoranda, such matter should be presented at the trial, and after proper introduction, placed in evidence. If the testimony of an office clerk, stenographer, or secretary, will round out the picture, such testimony should be presented.

The value of expert testimony depends upon the exigencies of each case. In some instances it will admit of high probative value, as where the witnesses are of recognized standing in the profession and their opinions are largely uncontradicted. But in all instances, the jury is free to fix such value to the opinions of experts as it deems proper, considering all the surrounding facts and circumstances. *Zimmer v. Kilborn*, 165 Cal 523, 132 Pac 1026, Ann Cas 1914D 368; *Shouse v. Consolidated Flour Mills Co.* 128 Kan 174, 277 Pac 54, 64 ALR 606; *Re Rhea*, 126 Neb 571, 253 NW 876.

The burden of proof is upon the plaintiff throughout the proceeding to establish the reasonableness of the fee which he seeks to collect. *Hightower v. Detroit Edison Co.* 262 Mich 1, 247 NW 97, 86 ALR 509.

Broadly stated, his proof should show the existence of a contract between the defendant and himself, performance upon his part in accordance with the terms of the agreement and in discharge of his professional obligations, or sufficient cause for partial or entire non-performance, as by showing acts outside his own control and due to the intervention of his client, and finally, the fact of nonpayment. *Ferris v. Snively*, 172 Wash 167, 19 Pac(2d) 942, 90 ALR 278.

TRIAL GUIDE

BAGGAGE CHECKED IN PARCEL ROOM OF CARRIER, LOSS OF

Q—You are the plaintiff in this action?

Q—Did you, on or about the 3rd day of May, 1944, leave a package or baggage with the defendant in this action?
A—I did.

Q—Do you recall the exact date?

Q—Please describe the articles left with the defendant, as near as you can recall.

Q—Where did you leave these articles?

Q—To whom were they delivered?

Q—Did you receive a receipt from any employee of the defendant at the time you delivered these articles?

Q—I show you what purports to be a receipt and ask if this is the paper you received? A—It is.
(Marked in evidence.)

Q—From whom did you receive this receipt?

Q—Did you pay a charge upon delivery of these articles?

Q—What was this charge?

Q—Did you thereafter have occasion to demand return of your articles?

Q—When did you make such demand?

Q—Did you present this receipt at the time you made your demand?

Q—To whom did you present the receipt?

Q—Were the articles returned to you? A—No.

Q—Did you make any subsequent demand?

(The value of the property lost should be proven by competent testimony.)

The rule seems well settled that where a carrier accepts baggage checked in its parcel room, on payment of a checking or service fee, that it becomes a bailee for hire, and bound to exercise reasonable and ordinary care in the keeping and safeguarding of the property entrusted to its custody. *Fraam v. Grand Rapids & I. R. Co.* 161 Mich 556, 126 NW 851, 21 Ann Cas 76; *Healy v. New York, C. & H. R. Co.* 138 NY Supp 287,

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153 App Div 516; affirmed 210 NY 646, 105 NE 1086, 7 ALR 1234.

"Railways commonly maintain parcel rooms at their depots in considerable cities, where passengers and others may, for a nominal charge, have their belongings cared for. This service is performed not only for the accommodation of the person using it, or the immediate profit arising therefrom, but may, and probably does, result in increased patronage of and profit to the road, because of the knowledge of the traveling public that such service is afforded. This service is not rendered by the railroad company in its capacity as a common carrier, for the articles are not checked for transportation, but for safe-keeping and redelivery at the place of deposit. In this phase of its activity, the company acts rather in the capacity of a warehouseman, who, for compensation, receives and stores the goods of another. Ordinary care means such care as ordinarily prudent men, as a class, would exercise in caring for their own property under the like circumstances, and whether it is exercised or not is a question of fact for the determination of the jury, under proper instructions." *Fraam v. Grand Rapids & I. R. Co.* 161 Mich 556, 126 NW 851, 21 Ann Cas 76.

Elsewhere it is stated: "In receiving baggage for deposit at its check room the defendant held itself out as a bailee for hire, and said to the public: 'I will receive your baggage for safe-keeping, giving you a numbered check, a duplicate of which will be attached to the baggage deposited that will enable identification and delivery upon your calling for same.'" *Dodge v. Nashville, C. & St. L. R. Co.* 215 SW 274, (Tenn), 7 ALR 1229.

The conventional relationship of bailee and bailor may, of course, be changed by the terms of any agreement between the parties, as by a printed condition on the checking slip or baggage receipt. *Dodge v. Nashville, C. & St. L. R. Co.* 215 SW 274, (Tenn), 7 ALR 1229.

It is stated in this connection:

"The business of checking hand baggage at railway stations has become a large and important one. It seems to me that anyone in the ordinary course of business, checking his baggage at such a place, would regard the check received as a mere token to enable him to identify his baggage when called for, and that in no sense would he have any reason to believe

that it embodied a contract exempting the bailee from liability or limiting the amount thereof. If the plaintiff knew that the defendant had limited its liability to \$10, either by his attention being called to it, or otherwise, then, of course, the law would deem him to have assented to it, so that a binding contract would be effected. If he did not know it, I think the law imposed no duty upon him to read his check to find whether or not there was a contract printed thereon, or that he was guilty of neglect in not so reading it, for he had no reason to apprehend that a contract was printed thereon." Ibid.

The extent to which the carrier may rely on the assumption that the owner of baggage entrusted to its care will read the printed terms on the baggage receipt, is indicated in the following holding:

"Now the question we have to consider is whether the railway company were entitled to assume that a person depositing luggage, and receiving a ticket in such a way that he could see that some writing was printed on it, would understand that the writing contained the conditions of contract, and this seems to me to depend upon whether people in general would in fact, and naturally, draw that inference. The railway company, as it seems to me, must be entitled to make some assumptions respecting the person who deposits luggage with them; I think they are entitled to assume that he can read, and that he understands the English language, and that he pays such attention to what he is about as may be reasonably expected from a person in such a transaction as that of depositing luggage in a cloakroom. The railway company must, however, take mankind as they find them, and if what they do is sufficient to inform people in general that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness. But if what the railway company does is not sufficient to convey to the minds of people in general that the ticket contains conditions, then they have received goods on deposit without obtaining the consent of the persons depositing them to the conditions limiting their liability." See 7 ALR 1237.

In some instances, courts have held that unless there exists proof of express knowledge on the part of the bailor of the

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terms of a provision in a receipt or checking memoranda, the liability of the carrier is not mitigated or reduced by virtue of the nature of such terms. *Healy v. New York, C. & H. R. Co.* 138 NY Supp 287, 153 App Div 516; affirmed 210 NY 646, 105 NE 1086.

In one case it was pointed out that "an unreasonable condition printed upon the coupon attempting to limit the liability of the defendant to not exceeding \$10 was void. Had notice been given by the bailee to the bailor of the condition limiting the liability of the former, and the latter then seen fit to enter into the bailment, a different question would be presented. But in the case at bar no notice whatever was given to the bailor of the existence of this condition, neither was there anything connected with the transaction, which was for the mutual benefit of both parties, which would tend in any way to suggest to a reasonably prudent man, or lead him to suspect, the existence of such a special contract, or tend to put him on guard or on inquiry relative thereto." *Ibid.*

BAILMENT, ACTION UPON

- Q—You are the plaintiff in this action?
- Q—Did you own a set of bedroom furniture on December 3rd, 1943, described as follows:
(Show the nature of the property involved, and identify same in detail.)
- Q—Did you have any conversations with the defendant in this action regarding the storage of this furniture?
- Q—When were these conversations held?
- Q—Where were the conversations held?
- Q—Did you thereafter enter into a written agreement with the defendant regarding the storage of this property?
- Q—When was this agreement entered into?
- Q—I show you a paper and ask if that is the agreement you refer to?
(Marked for identification.)
- Q—Did the defendant in this action thereafter call for this property?
- Q—Did he remove same from your home?
- Q—On what date was such removal made?
- Q—Did you thereafter make demand for the return of this furniture?
- Q—When was such demand made?
- Q—To whom was the demand made?
- Q—Was the property returned to you?
(The proof should be clear upon the nature of any agreements made respecting the storage of the property, the circumstances under which it was to be returned, and what was necessary for the bailor to do to make out a proper demand.)
(The proof should also make clear the value of the property. See text.)
(Local statutes definitive of a bailee's duty should be consulted.)
(Damage upon removal.)
- Q—Did you observe the actual removal of the property from your home?
- Q—What, if anything, did you notice take place with respect to such removal? A—I noticed that one of the helpers dropped a bureau as he helped lift it into the truck, dropping it to the street.

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Q—Did you observe what happened to the bureau thereafter?

A—Yes, I observed that two of the legs fell off and dropped to the street.

Q—What was the condition of the bureau before it left your house?

A bailee is ordinarily under a duty to exercise no more than reasonable care in the handling of property entrusted to him, although the courts have used a wide variety of expressions in seeking to define what constitutes reasonable care on the part of a bailee. 6 Am Jur § 253, p 341; see also 9 ALR 559.

Precisely what constitutes lack of care in this connection is dependent upon the facts and circumstances of each case, and must be judged in the light of judicial expression in the particular jurisdiction, as well as any statutory provisions applicable to bailments. Ibid.

The precise degree of care that must be used in the instance of a bailee entrusted with valuable property, to protect the same against theft, has been proportioned to a wide variety of circumstances. Annotation: 26 ALR 226.

"It is the settled rule of law that in a bailment for hire the bailee is bound to exercise reasonable or ordinary care. . . . Of course, as to what would be reasonable care would depend largely upon circumstances, for what would be reasonable care concerning the storage of coal or iron would not necessarily be reasonable care concerning the storage of valuable jewelry and works of art. *Firestone Tire & Rubber Co. v. Pacific Transfer Co.* 120 Wash 665, 208 Pac 55.

The character of the property, nature of the depositary where it is stored, and the locality generally, have been pointed out as factors to be considered in evaluating the degree of care properly exercisable under the circumstances. *Third Nat. Bank v. Boyd*, 44 Md 47, 22 Am Rep 35; Annotation: 26 ALR 227.

A bailee is not, for example, required to store valuables in an absolutely fire proof structure, nor is he under a duty to adopt such safeguards against theft as will absolutely and under all circumstance make a burglary impossible. *Hutchinson v. United States Exp. Co.* 63 W Va 128, 59 SW 949, 14 LRA(NS) 393.

The rule is well summarized in the following:

"The 'circumstances surrounding each particular case' must

be considered. Prudence would demand a greater degree of care on the part of a bailee at Columbia than in Oconee, a small and quiet village, where, much to its credit, crime is seldom committed; while a still greater degree of diligence would be looked for from one in Charleston than in Columbia, because of the varied and changing character of the population of the metropolis, and of the more extensive field which it presents for the perpetration of crime. If ordinary negligence is to be inferred from the absence of the appliances which the mechanical skill of the age has invented, without regard to the place, there would be no discrimination between a loss by a bailee through theft in an extensive city or a secluded village. Can common reason, or common sense, justify a requirement in the law that would demand of a banker in Columbia the employment of the same security against theft, both in regard to the building and the vault, that would be demanded of one in New York or Charleston?" *Scott v. Crews*, 2 SC 522.

The standard of care to be applied is that existing among bailees in the same business as the defendant; it is improper to apply a broad and universal standard of care where a particular craft or business has, by common usage, adopted standards of its own. *Third National Bank v. Boyd*, 44 Md 47, 22 Am Rep 35, where the court approved a charge that a bank would be liable for the theft of bonds entrusted to its care if the jury found that the bonds had been stolen "in consequence of the failure on the part of the defendant to exercise such care and diligence in the custody or keeping of them as, at the time, banks of common prudence in like situation and business usually bestowed in the custody and keeping of similar property belonging to themselves; that the care and diligence ought to have been such as were properly adapted to the preservation and protection of said property, and to have been proportioned to the consequences likely to arise from any improvidence on the part of the defendant."

The burden of proof is upon the plaintiff to establish that a bailment existed at the time alleged, and that a breach of a specific duty took place on the part of the defendant; except of course, where the defendant raises an affirmative defense, in which event the burden rests upon the defendant to establish the allegations of such defense. *Claffin v. Meyer*, 75 NY

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260, 31 Am Rep 467; *Stone v. Case*, 34 Okla 5, 124 Pac 960; *Colburn v. Washington State Art Association*, 80 Wash 662, 141 Pac 1153.

In those instances where the plaintiff relies merely upon a breach of contract, he need show no more than ownership of the property involved, delivery to the defendant under circumstances creating a bailment, and due demand for return of the property, with a subsequent failure of the defendant to comply therewith. *Smith v. Noe*, 159 Tenn 498, 19 SW(2d) 245.

It may be noted in this connection that the plaintiff is not required to show the specific act on the part of the defendant explanatory of his failure to deliver the goods; he is not under a duty to investigate the reasons for the defendant's inability to turn over the property, or isolate any specific cause. *Hansen v. Oregon-Washington R. Co.* 97 Or 190, 191 Pac 655.

As a practical matter, however, where the plaintiff is in possession of facts which indicate the nature of the defense to be offered, as a fire, it is well to be prepared to show any facts available in support of the proposition that the defendant failed to discharge his duty as a bailee. While the plaintiff will establish his prima facie case in an action on contract by showing no more than ownership or custody, delivery and failure to return, still he should anticipate that the defendant will come forth with proof showing that he discharged the duties imposed upon a bailee and that the failure to deliver is due to causes over which he had no control, or which in the exercise of reasonable care, he was under no duty to guard against. But in the event the plaintiff pleads negligence on the part of the defendant, alleging lack of care in discharge of his duties as bailee, the plaintiff must establish the facts and circumstances constituting negligence. *Stewart v. Stone*, 127 NY 500, 28 NE 595; *Traders Compress Co. v. Precure*, 140 Okla 40, 282 Pac 165; *Firestone Tire and Rubber Co. v. Pacific Transfer Co.* 120 Wash 665, 208 Pac 55.

According to some authorities, the bailee discharges his burden of going forward with evidence (after the bailor shows non-delivery) by proof establishing loss or damage of the property in question under circumstances as consistent with reasonable care as lack of due care (for example, a fire or theft under unexplained circumstances). *Southern R. Co. v. Prescott*, 240 US 632, 60 L ed 836; *American Brewing Co. v. Tal-*

bot, 141 Mo 674, 42 SW 679; *Lamb v. Camden, etc. Transp. Co.* 46 NY 271, 7 Am Rep 327.

But the majority view, and the theory better supported by reason and modern judicial trend, is that the bailee is under a duty to do more than merely show loss or damage of the property; he must come forward with sufficient evidence to show some plausible basis for the failure on his part to perform the duties of a bailee. Stated more concretely, he must show the manner in which he stored the property, the precautions adopted against loss or damage, and the circumstances under which such loss or damage occurred. *Lederer v. Railway Terminal & Warehouse Co.* 346 Ill 140, 178 NE 394; *Merchants Nat. Bank v. Carhart*, 95 Ga 394, 22 SE 628; *Wiley v. Locke*, 81 Kan 143, 105 Pac 11; *Beck v. Wilkins-Ricks Co.* 179 NC 231, 102 SE 313.

"When a bailee fails to return the property, or return it in a damaged condition, the burden is upon him to show that the loss or damage did not occur through his negligence. . . . But if the bailee establishes that the loss occurred through inevitable accident or irresistible force—which do not of themselves import negligence—the burden of proving negligence is upon the bailor." *Bissell v. Harris*, 1 Neb 535, 95 NW 779.

"But where the refusal to deliver is explained by the fact appearing that the goods have been lost, or either destroyed by fire or stolen by thieves—and the bailee is therefore unable to deliver them, and there is no prima facie evidence of his want of care, the court will not assume, in the absence of proof on the point, that such fire or theft was the result of his negligence." *Claffin v. Meyer*, 75 NY 260, 31 Am Rep 467.

Before drawing any pleadings in an action for bailment, counsel for plaintiff should carefully familiarize himself with the law in his own jurisdiction pertaining to bailments; the nature of any agreements or understandings entered into between the parties to the bailment (with specific reference to the character of the bailment, the extent of care to be exercised by bailee, the place of storage and manner of handling); the circumstances of the loss or damage, particularly in so far as any evidence of negligence or lack of care is shown; and any facts explanatory of the manner in which the goods were stored.

The theory of the cause of action should only be determined after all these facts have been fully evaluated to the greatest

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extent possible under the circumstances of each case. It is obviously unwise to frame a cause of action on breach of contract alone, when the facts amply support a finding of negligence. Similarly an action should not be grounded in negligence when there is an absence of facts in support thereof.

The rule has been stated as follows:

"As a general rule, when a bailee fails, on demand, to deliver to the bailor property to which the latter is entitled, the presumption of liability arises; and, if the goods cannot be found, it furnishes the imputation of negligence as the cause. . . . But such *prima facie* case may be overcome when it is made to appear that the loss was occasioned by some misfortune or accident not within the control of the bailee; then the onus continues upon the bailor to prove that it was chargeable to the want of care of the bailee. And although it may be that the proof given by him explanatory of the reason for non-delivery may disclose circumstances which, in their nature, permit or require the inference of negligence on his part, . . . the affirmative of the issue is not shifted to the defendant, but remains through the trial with the plaintiff." *Stewart v. Stone*, 127 NY 500, 28 NE 595.

In one case, involving loss of bailed property through fire, it was stated:

"The plaintiffs made out their case when they established to the satisfaction of the court, the allegations of their complaint. It was then for the defendant to establish the allegations of his affirmative defense, if he could do so. The court has found that he was grossly negligent in the matter of exposing the property to loss by fire, and that the property was destroyed by fire of an unknown origin. The facts found suggest at least a probability that the fire came from the same source from which emanated the 'more than ordinary risk' under which the property was so negligently placed by the defendant. Under the circumstances disclosed by the findings, the burden which the defendant had assumed in his affirmative defense was upon him to satisfy the court that the fire did not come from this source. It is not necessary to hold that the burden of proof was upon the defendant solely for the reason that he had assumed it in his answer. Irrespective of any consideration upon whom the burden of proof lay, the issue before the court was to determine whether the defendant

had exercised the ordinary care required of him as a warehouseman, and whether his negligence in that respect had contributed to the loss of the plaintiff's property. . . . Whether the fire occurred without his knowledge, or whether the origin of the fire was unknown, were not in themselves conclusive of this question. The character of the building provided by him for the storage of the property, the character of the business for which he had permitted a portion of the building to be used, and, in view thereof, the precautions taken by him for the prevention of fire and for its extinguishment, were also elements proper to be considered in determining the issue. . . . It is evident from the findings above quoted that there was evidence before the court tending to show that the defendant did not exercise the ordinary care required of him as a warehouseman. This was sufficient to cast upon him the burden of showing that the loss did not arise from his negligence, but was the result of some agency with which he was entirely disconnected." *Dieterle v. Bekin*, 143 Cal 683, 77 Pac 664.

Elsewhere the rule is stated as follows:

"The defendant as bailee assumed liability of ordinary care for the safe-keeping and the return of the machine to the bailor in good condition. The bailee did not assume liability as insurer, and therefore did not become liable for the nonreturn of the property in good condition if he observed the ordinary care devolved upon him by reason of the bailment. If the machine had been injured or stolen or destroyed by fire while in his custody the defendant would not be liable if such care had been observed. On the other hand, the mere fact that the property had been destroyed by fire or stolen did not absolve him from responsibility, any more than he would have been absolved if it had been injured in his custody, unless he had shown that he had used the care required of him by virtue of his bailment. The burden of proving negligence was on the plaintiff, and this burden does not shift; but when it was shown, or admitted, that the machine was not returned by reason of its being destroyed or stolen, or that it was returned in injured condition, it was the duty of the defendant to 'go forward' with proof to show that it had used proper care in the bailment." *Beck v. Wilkins-Ricks Co.* 102 SE 313 (NC), 9 ALR 554.

It is specifically pointed out that the mere "destruction or

loss of property is not conclusive of negligence, the failure to return the property does devolve upon the defendant the burden of going forward with proof to show that it discharged its duty of requisite care of the property while in its custody. It would be singular if the mere fact that the property was destroyed or stolen or injured was conclusive that the bailee had exercised proper care. It had the best knowledge of the facts, and if proof thereof was not forthcoming, the presumption is that it could not produce it." Ibid.

The rules of law above stated should be evaluated in the light of the circumstances of each case, particularly the character of the agency or event causing the loss.

Thus, it is held that the collapse of a warehouse in which bailed goods are stored, without any proof of external violence, is sufficient to make out a *prima facie* case of negligence, the court pointing out:

"The accident which caused the loss here is of a different character from that of fires or thefts by burglary. Fires are very numerous, especially in cities. . . . Though at times occasioned by negligence, it is in very many cases impossible to discover their origin, and often, when discovered, it appears that the fires were not occasioned by fault or negligence on the part of anyone. It is almost equally difficult to guard against thefts and burglaries. But the collapse or fall of a building from no external violence, nor earthquake or similar cause, is almost invariably the result of negligence, either in the construction of the building or in overloading it. It is so exceptional an occurrence that it is difficult to imagine a case to which the rule '*res ipsa loquitur*' would more forcibly apply." *Kaiser v. Latimer*, 57 NY Supp 833, 40 App Div 149.

A bailee does not meet his burden of coming forward with satisfactory proof of the circumstances of the loss, so as to exculpate him from liability, by evidence that his own property was stolen at the same time as the bailor's property. *Erie Bank v. Smith*, 3 Brewst (Pa) 9.

Thus, it has been held, in a case of theft of bonds from a bank that "it is not enough to say that the pawnee took the same care of the thing pledged as he did of his own goods, nor is it any answer to the demands of the pawnor, or debtor, to show that his own property, to an equal or greater amount, was lost at the same time and by the same alleged negligence.

He must go further than that, and satisfy the jury that there was ordinary diligence in keeping his own property. If it appears that he was not diligent in keeping his own property, that would be no excuse for negligence in keeping the property of others entrusted to him. Yet, nevertheless, as every man is presumed to exercise ordinary care of his own property until the contrary is shown, where the bailee's own goods or property are lost by the same occurrence, the same theft, the same fire, or whatever it may be that destroys it, in the absence of evidence there is a presumption in his favor—a presumption that he used ordinary diligence as to his own goods." Ibid.

The nature and quantity of proof that will satisfy the burden imposed upon the bailee to explain the loss of property, obviously depends upon the facts and circumstances of each case.

Thus, in the instance of a warehouseman charged with the loss of funds through theft, it was held insufficient for the defendant to merely show the loss of the property after deposit of same in a safe, the locking of such safe, and the breaking into of the building by burglars. *American Exp. Co. v. Hockett*, 30 Ind 250, 95 Am Dec 691.

The court laid down these tests:

"What was the character of the office building? Was it so constructed and guarded as to make it a reasonably safe place in which to have money packages unguarded? The answer is silent in this respect, and we cannot infer that it was an appropriate or safe building for such a purpose. Nor does it appear that the safe in which the money was deposited was such that the persons of ordinary prudence would have risked in it such deposits. It is called a safe, yet, for anything shown by the answer, it may have been an insecure wooden box. The building was unguarded, and if, as alleged in the answer, the company was accustomed to leave the money packages, received in the course of its business, deposited there, it might reasonably be expected that thieves and burglars would closely scrutinize its condition, and common prudence would require that either the building or the safe should be such as would likely resist such an attack; but there is nothing in the answer showing that such was the character of either. So that, if the facts alleged in the answer could be deemed sufficient to dis-

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charge the appellant from liability as a carrier, still it fails to show that it exercised reasonable care with the package as bailee." Ibid.

The plaintiff should be fully prepared with evidence of the market value of the property involved, in those instances where such proof is necessary in establishing damages. If the property in question has a market value at the time and place involved, any qualified witness may testify as to the same. *Jones v. Morgan*, 90 NY 4, 43 Am Rep 131.

Where no such market value can be shown, due to the nature of the property, the plaintiff may show value by any other competent proof. Thus, he may show in a proper case the cost price of a specific commodity, and the depreciation thereof, as a basis for the *actual value* to the owner at the time of the loss. See 6 Am Jur No. 388, p 466.

Insurable value, as declared by the owner in insuring the property before or at the time of creation of the bailment, is not admissible in proof of value. *Adelphia Hotel Co. v. Providence Stock Co.* 277 F 905, 26 ALR 213.

The defendant may not show by way of defense to the allegation of lack of care on his part, that for many years in the past all property entrusted to him had been safely returned, without any loss or damage. *Carter v. Allenhurst*, 100 NJL 138, 125 Atl 117.

But the bailee may show the precise nature of the safeguards that he used in protecting the specific property involved in the action, and any other circumstances explanatory of due care on his part.

The fact that property is stolen is not ordinarily sufficient, standing alone, to establish negligence on the part of the bailee. *Firestone Tire & Rubber Co. v. Pacific Transfer Co.* 120 Wash 665, 208 Pac 55.

This rule has even been extended to thefts by employees of the bailee, which have been held insufficient to support a finding of negligence, unsupported by other proof. Ibid.

Similarly, the mere fact that a building in which the property is stored is not burglar-proof, is not sufficient to show negligence on the part of the bailee. *Hutchinson v. United States Exp. Co.* 63 W Va 128, 59 SE 949.

Where the bailee possesses knowledge of the circumstances of the loss, he is fully competent to explain same as a witness

in his own behalf. *Lampley v. Scott*, 24 Miss 528, where the court pointed out as follows:

"It would seem, if any case would constitute an exception to the general rule, it would be one circumstanced as the case before us, in which a bailee without reward is seeking to defend himself against a presumption of gross negligence, and where the facts which constitute his defense could, in the nature of things, be susceptible of no other proof than his own statements. Under ordinary circumstances, he would be the only witness of the facts which constitute his defense. Robberies, when committed, usually take place in secret, and in the absence of all other persons than the party robbed. Hence, no prudence, no foresight, no sagacity would prompt a man to prepare evidence of a transaction which he himself could not anticipate, and could not, therefore, guard against. To hold, under such circumstances, that a party could not exculpate himself by his own statements of the facts, would in many instances leave him without redress, and bankrupt him in fortune and character for simply undertaking an act of ordinary kindness."

But a finding of negligence may be supported in a case of loss of property by fire, where it is shown that the fire took place under circumstances which make reasonable the assumption that had proper precautions and safeguards been taken, the fire would not have taken place, or at least, would have been discovered in time to save the property of the bailor, or reduce the damage thereto. *Traders Compress Co. v. Precure*, 140 Okla 40, 282 Pac 165, 71 ALR 759. See also: *Safe Deposit Box, Action Involving Use of*.

BAILOR, LIABILITY FOR DEFECTS IN PROPERTY

Q—You are the plaintiff in this action?

Q—Did you, on or about the 9th day of October, 1943, make use of an automobile belonging to the defendant in this action?

Q—Did you, prior to that occasion, have any conversations with the defendant regarding your use of this car? A—Yes.

Q—Will you tell us the substance of these conversations? A—The defendant agreed to let me use the car at the rate of \$1.00 for each hour, etc.

(The character of the bailment should be shown in detail.)

Q—Did you make any payment of money pursuant to this arrangement?

Q—What sum was paid, and to whom?

Q—Upon what date was this payment made?

Q—Did you thereafter make use of this automobile, pursuant to the arrangement just explained?

Q—What, if anything, happened to you while making use of this vehicle? A—I ran off the road, striking a tree, etc.

Q—Did you have an examination made of the car following this accident? A—I did.

Q—Who made this examination?

(The precise character of the defect should be shown through a qualified witness. A bailor may be found liable for defects in a motor vehicle, where the defects were such that, in the use of reasonable care, he should have known about them. See text.)

The courts are not generally agreed in their views upon the liability of a bailor for personal injuries sustained in the use of the bailed property. Generally, it is stated that the bailor is held to a high degree of care, or the exercise of reasonable care under the circumstances, in making an examination of the chattel before surrendering his possession of same; and further, that he impliedly warrants such chattel as fit for the use known to be intended therefor. *Cooper v. Layson Bros.* 14 Ga App 134, 80 SE 666; *Horne v. Meakin*, 115 Mass 326; *Kissam v. Jones*, 56 Hun 432, 10 NY Supp 94; Annotation: 12 ALR 774.

Thus, it is stated:

"A man who makes a machine to be hired out for a particular purpose is under an obligation to make such machines so as to be sufficiently strong to answer the purpose intended." *Cook v. New York Floating Dry Dock Co.* Hilt. (NY) 436.

The rule stated has been applied in the case of vehicles, horses, and carriages. See cases collected in 12 ALR 778.

In the instance of a horse, it was stated:

"The defendant hired this horse to the plaintiff, and gave him no notice of any vicious propensity, when he knew that the horse had the habit of turning around in the road, than which nothing can be more dangerous. . . . When the defendant hired this horse to the plaintiff, the law cast upon him the duty and obligation to give the plaintiff a horse that was manageable and safe. The law is that the defendant warranted the horse, wagon, and harness to be fit for the use contemplated; and such warranty is always implied where the quality or fitness of the article for the use specified is not visible, and the defect is not discernible by an ordinary observer. The keeper of a livery stable, engaged in the business of letting carriages and horses on hire, is bound to furnish a customer with a carriage and harness reasonably strong, safe, and secure for the purposes of the journey." *Kissam v. Jones*, 10 NY Supp 94, 56 Hun 432.

As illustrative of the degree of care demanded in the case of those who rent out vehicles as conveyances, attention is directed to the law applicable to coaches used by common carriers, where it held that:

"Carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against; and that if an accident happens from a defect in the coach which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded

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against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense."

Where the subject of the bailment is an animal, as a dog, to be used for exhibition purposes, or a horse, the question frequently arises as to the extent to which the bailor is held to knowledge of the habits of the animal. The rule applicable to such situations has been stated as follows:

"If the habit is such as, by possibility, may be injurious if indulged in, adequate measures to prevent its indulgence must be adopted. But where the chances of injury are so exceedingly small that careful and prudent persons would not resort to measures of protection against their occurrence, yet injury does happen, the owner is not liable, although no measures of prevention are taken. An owner should give notice to persons dealing with an animal that has vicious propensities, when he knows that serious injury would be inflicted if the animal should take occasion to indulge therein. When a biting or kicking horse is left with a blacksmith to be shod, or with a hostler to be groomed, notice is indispensable to prevent serious and, it may be, fatal injury. But who could anticipate that the plaintiff, or any person, would have his finger in the position in which the plaintiff's was, and that the loss of the finger would be the result. Again, as it is impossible for any person to anticipate what injury may, under a fortuitous concurrence of circumstances, be caused by an animal indulging in the most harmless of its habits, it would follow that the owner must enter, at every hotel and blacksmith shop, upon an enumeration of all the bad habits of his horse, or be subjected to damages if, by reason of indulging in one of them, injury should result. The case was not, in my judgment, one in which the defendant was under any legal obligation to notify the plaintiff that the horse was a 'puller;' that duty is imposed only when the habit is one that is ordinarily and directly dangerous to either person or property." *Keshan v. Gates*, 2 *Thomp & C* (NY) 288.

Local statutes should be consulted in connection with evaluating the liability of a bailor in a specific case. Thus, in one jurisdiction, bailors for hire impliedly warrant that the sub-

ject of the bailment is free from "any secret fault rendering it unfit for the purposes for which it is hired." *Parker v. Loving*, 13 Ga App 284, 79 SE 77, where the court stated that:

"Under our status the bailor warrants the soundness and suitability of the thing bailed, and is liable for any injury or damages which may result from a latent defect, of which the bailee has no knowledge, and the consequences of which he could not avoid by the exercise of ordinary care. Much more is it the duty of the bailor to see that the thing bailed is free from patent defects which render it unfit for the purposes for which it is hired. If the hirer knows of the defect, or in the exercise of ordinary care ought to discover it, and, notwithstanding this actual or implied knowledge, he uses the thing, and injury results on account of the defect, he will be held to have waived his right to claim damages, since by the exercise of ordinary care he could have avoided the consequences of the bailor's neglect. But what amount of care the bailee ought to use to discover the defect is a question of fact for the jury."

A gratuitous bailor is in no event liable for defects in the bailed property of which he is unaware; his duty extends only to a disclosure of defects that he knows about. *Johnson v. Bullard*, 95 Conn 251, 111 Atl 70, 12 ALR 766.

As stated: "While in many respects the duties and liabilities of the parties are materially different in the case of a gratuitous bailment and one for hire, it is enough for the present purpose to observe that, while in the former the benefit is exclusively to the bailee, and therefore the liability of the bailor for defects in the thing loaned extends only to those which are known to him and not communicated to the bailee, in the latter, the bailment being for the mutual benefit of both alike, the bailor's obligation is, and of right ought to be, correspondingly enlarged; and it is, therefore, his duty to deliver the thing hired in a proper condition to be used as contemplated by the parties, and for failure to do so he is justly liable for the damage directly resulting to the bailee or his servants from its unsafe condition. This distinction is fundamental, and of universal recognition." *Gagnon v. Dana*, 69 NH 264, 39 Atl 982, 41 LRA 389.

"If the defendant itself did not have actual notice, it is not liable for failure to give notice. If, however, the defects are open and patent to the bailee, or he in fact had adequate

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knowledge and information of them, there is no duty to notify him, because such notice would be quite unnecessary for his protection. The point is that the lender, though acting gratuitously, must not knowingly set a trap for an innocent borrower." *Johnson v. Bullard*, 95 Conn 251, 111 Atl 70, 12 ALR 766.

BANK, NEGLIGENCE IN COLLECTION OF NOTE

- Q—You are the plaintiff in this action?
- Q—Were you, on or about the 18th day of July, 1943, the owner of a check drawn to your order, signed by one John Good? A—Yes.
- Q—Upon what bank was this check drawn?
- Q—Do you recall the date of the check?
- Q—What was the amount of the check? A—\$623.98.
- Q—Did you thereafter deposit this check for collection?
- Q—With what bank did you deposit the check for collection
A—The defendant, the First National Bank.
- Q—On what date did you make this deposit? A—July 27th, 1943.
- Q—I show you a passbook, and direct your attention to an entry of deposit for July 27th, 1943, in the amount of \$623.98; does this entry represent the deposit you have just described? A—Yes.
- Q—Did you thereafter receive any communication from the defendant respecting payment of this check?
(The proof should disclose in detail the acts of negligence on the part of the defendant bank, and the damages sustained by the plaintiff as a proximate result thereof.)

The weight of authority inclines to the view that the proper measure of damages for failure of a bank to collect commercial paper, is the actual amount of damages or loss incurred as a result of such neglect. *First Nat. Bank v. Henry*, 159 Ala 367, 49 So 97; *Spooner v. Bank of Donalsonville*, 144 Ga 745, 87 SE 1062; *Fox v. Davenport Nat. Bank*, 73 Iowa 649, 35 NW 688; *Montgomery County Bank v. Albany City Bank*, 7 NY 459; *Farmers & M. Bank v. Kingwood Nat. Bank*, 85 W Va 371, 101 SE 734; see also cases collected in 19 ALR 555.

The losses sustained should be shown by competent proof to be directly traceable to the acts of negligence on the part of the bank. *Merchants State Bank v. State Bank*, 94 Wis 444, 69 NW 170.

The proof should make clear the nature of the relationship existing between the bank and the plaintiff, or owner of the paper, and any facts explanatory of the character of the paper involved in the case:

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"It is a fundamental principle that negligence on the part of an agent in the transaction of the business of his principal will not render him liable for damages, unless his negligence results in an actual injury to his principal. And as a corollary the damages recoverable by a principal for the negligence of his agent are the actual loss which the principal has suffered. So, it would seem to follow that a recovery for the negligence of a collecting bank resulting in a failure to make the collection, should be limited to the actual loss suffered by its customer." *Bank of Mobile v. Huggins*, 3 Ala 206; *Kriste v. International Sav. & Exch. Bank*, 17 Cal App 301, 119 Pac 666; *Northwestern Nat. Bank v. Peoples State Bank*, 109 Kan 506, 200 Pac 278, 19 ALR 551; *First Natl. Bank v. Fourth Nat. Bank*, 77 NY 320, 33 Am Rep 618; *Lineau v. Dinsmore*, 41 How Pr(NY) 97, 3 Daly 365; *Huff v. Hatch*, 2 Disney (Ohio) 63; *Merchants State Bank v. State Bank*, 94 Wis 444, 69 NW 170; *Northwestern Nat. Bank v. Peoples State Bank*, 109 Kan 506, 200 Pac 278, 19 ALR 551.

"It is apparent that a mere agency is created when a note is deposited for collection, and we find it difficult to imagine any circumstances which can cast on one standing in this relation a liability to a greater extent than the actual amount of injury sustained by the principal. To permit a recovery for more would be to inflict damages on the agent, as a penalty for his misconduct merely; and, beyond the damage sustained, the principal would seem to have no better title than an indifferent person. *Bank of Mobile v. Huggins*, 3 Ala 206.

According to some authorities the face of the paper affords the proper test as to the amount of damages recoverable, so that a prima facie case is made out by mere proof of the loss and the circumstances thereof. *Kriste v. International Sav. & Exch. Bank*, 17 Cal App 301, 119 Pac 666; *Gilpin v. Columbia Nat. Bank*, 167 App Div 46, 152 NY Supp 619.

There is also authority for the view that in order to recover more than merely nominal damages, the owner of the paper must prove the actual monetary losses sustained. *Hilsinger v. Trickett*, 86 Ohio St 286, 99 NE 305, Ann Cas 1913D 421; *Sahlien v. Bank of Lonoke*, 90 Tenn 221, 16 SW 373; *Farmers & M. Bank v. Kingwood Nat. Bank*, 85 W Va 371, 101 SE 734.

In one case it was pointed out as follows:

"The bank undertook to act as the agent of the plaintiffs in collecting their claim against Dow. It was bound to keep with-

in the authority conferred upon it, and exercise proper diligence to obtain payment. . . . If the debt was lost through its fault it is liable. The measure of damages in such case is the actual loss resulting from the agent's omission of duty. If there is reasonable probability that the entire debt would have been collected but for the agent's negligence, the amount of the claim is the measure of recovery. It is only necessary to show a reasonable probability that, with due care, the collection would have resulted. The burden, then, rests on the defendant to show that there was no damage." *Omaha Nat. Bank v. Kiper*, 60 Neb 33, 82 NW 102.

In accordance with the view that only the actual monetary losses may be recovered, it is held that the bank may show any factors which would tend to explain or clarify the extent of collectability of the paper involved. Thus, if it can be shown that a note has little, if any, actual value, this may be offered by the defendant as evidence of the actual loss sustained. *Bridge v. Mason*, 45 Barb(NY) 37; *Mott v. Havana Nat. Bank*, 22 Hun(NY) 354; *Huff v. Hatch*, 2 Disney (Ohio) 63; Annotation: 19 ALR 568.

This view is expressed in the following:

"The actual loss sustained by the principal in consequence of the misconduct of the agent is the amount of damages for which he is responsible. In the case before us, it was in evidence that the maker of the note died insolvent, and his estate might possibly divide a small percentage among the creditors, but it might not be sufficient to pay the preferred debts; and the court, therefore, instructed the jury they might regard the amount of the note, if they should find the facts to be true as to the insolvency of the deceased debtor, as the measure of damages; that the possibility of a small dividend being afterward declared was remote, and ought not to postpone the right of the plaintiff to recover for the whole amount of the note; and the risk of any future payment being made he ought not to be required to take. This exposition of the law, we think, was correct. The mere chance of a future recovery of a part of the claim was not the proper subject for the consideration of a jury, as it was evident, for all practical purposes, the note had no real value." *Huff v. Hatch*, 2 Disney (Ohio) 63.

"When the agent so deals with the draft as to secure and

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preserve to his principal all his rights and remedies against the prior parties to the bill, he is liable only for the actual or probable damages which his principal has sustained in consequence of his negligence. In all these cases, the negligence of the agent being established, it is a question of damages, and the agent may show, notwithstanding his fault, that his principal has suffered no damages; and the recovery can then be for nominal damages only. He may show, in reduction of the damages, that if he had used the greatest diligence, the bill would not have been accepted or paid, or that his principal holds collaterals, or has an effectual remedy against the prior parties to the bill." *First Natl. Bank v. Fourth Nat. Bank*, 77 NY 320, 33 Am Rep 618.

"The amount of the note was prima facie the rule of damages. The defendants can show in mitigation of damages that the indorser is insolvent, or not worth property sufficient to enable the amount to be realized by process on a judgment. If the indorser is shown to be wholly insolvent and destitute of means, the defendants are entitled to a verdict. The plaintiffs are entitled to recover such damages only as they have sustained, having reference to the amount of property which it shall appear from the evidence that the indorser, whose liability has been lost by the negligence of the defendants, was possessed of as owner." *Bridge v. Mason*, 45 Barb(NY) 37.

See also *Mott v. Havana Nat. Bank*, 22 Hun(NY) 354, holding: "In an action for neglecting to protest a note, whereby the liability of an indorser has been lost, the party sued has a right to show, on the question of damages, any such state of facts as will tend to show that the loss of the plaintiff has been less than the face of the obligation of the maker. The general rule is that in an action for negligence, the plaintiff can recover no more than the amount which will fully compensate him for the injury sustained by the negligence in question. And in an action of this particular character the defendant may show that the creditor holds collateral securities for the payment of the debt, to which he may resort in diminution of the damages which would prima facie appear to have been sustained by the negligent omission to charge the indorser."

The burden of proof is, however, upon the bank to show that if it had fulfilled its part of the contract, the plaintiff

would not have collected in full. *Mott v. Havana Nat. Bank*, 22 Hun(NY) 354; *Bridge v. Mason*, 45 Barb(NY) 37; *Huff v. Hatch*, 2 Disney (Ohio) 63.

"It is quite clear that the defendants should, at least, have given due notice to the plaintiffs of the nonpayment of the draft, and, not having done so, they must be held liable to the plaintiffs for all damages sustained by them, by reason of their negligence. But it seems to me that, before the plaintiffs can recover more than mere nominal damages, they must show that they could, in all probability, have collected the amount of the draft, or some part thereof, from the drawee, if they had received the notice of nonpayment which the defendant's duty in the premises required them to give. . . . The defendant having used due diligence in endeavoring to obtain payment of the draft, and having failed, the plaintiffs must show that they could have done better, and that there was, at least, a reasonable probability that they could have collected the amount of the draft, if they had been properly notified that the same was not paid, before they are entitled to recover the full amount thereof. But, having done that, I think they would be *prima facie* entitled to a verdict or judgment for that amount, and the onus would then be upon the defendants to prove that the real loss or damages sustained by the plaintiffs, in consequence of the negligence imputed to them, was not the whole amount of the draft." *Lineau v. Dinsmore*, 41 How Pr(NY-) 97, 3 Daly 365.

BROKERS COMMISSION, ACTION ON QUANTUM MERUIT

It is generally agreed that no cause of action lies by a broker for recovery of the value of his services in buying or selling real estate upon a quantum meruit basis, where his contract was not in writing, as required by local statute. *McCarthy v. Loupe*, 62 Cal 299; *Weatherhead v. Cooney*, 32 Idaho 127, 180 Pac 760; *Peters v. Martin*, 69 Ind App 436, 122 NE 16; *Paul v. Graham*, 193 Mich 447, 160 NW 616. Annotation: 17 ALR 891.

"It is notorious that claims made by real estate brokers against owners of property for commissions arising from the sale of land, which claims were often founded upon mere casual conversations the owners did not understand to amount to a contract, have been a most fruitful source of litigation." *Seifert v. Dirk*, 184 NW 698 (Wis), 17 ALR 885.

"To permit a recovery upon the quantum meruit, or upon an implied contract would be to defeat the purpose of the statute, and supply by implication a contract which the statute expressly says may only be proven by written evidence." *Cushing v. Monarch Timber Co.* 75 Wash 678, 135 Pac 660.

TRIAL GUIDE

BUILDING, MISTAKE AS TO BOUNDARY

(Action involving proof of ownership of structure standing upon property of adjoining landowner)

- Q—You are the plaintiff in this action?
- Q—Are you the owner of property located at 19 Fox Street, Brooklyn, New York?
- Q—What are the dimensions of this property?
(Prove size of lot, fixing location of boundaries.)
- Q—Did you, during July of 1942, begin the construction of a building upon, or adjacent to, your property?
- Q—When was this structure completed?
- Q—Please describe for this court and jury the exact location of the building.
- Q—Did you, prior to the beginning of work upon the building, have any conversations with the owner of the adjoining land as to the location of your building?
- Q—Describe the time and place of these conversations.
- Q—Who was present at that time?
- Q—Now describe the substance of the conversations.
- Q—During the course of these conversations did you make mention of the approximate location of your new building?
- Q—What marker did you use in locating the westerly boundary of your property?
- Q—Did you see the defendant in the vicinity of your property at any time during the process of construction of your building?
(Fix time, place and surrounding circumstances.)
(Any acts tending to show knowledge, participation or inducement on the part of the adjoining landowner, should be fully elaborated.)
- Q—When was the first time that you learned this building was situated upon the defendant's property?
- Q—When was the first time that the defendant informed you of this circumstance?

According to some decisions, a structure of a permanent character erected upon another's land as a result of a mistake in fixing the boundary lines, becomes the absolute prop-

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erty of the landowner as a part of the realty to which it is so annexed, notwithstanding that the person erecting the building does so in the belief it is placed upon his own land. *Dutton v. Ensley*, 21 Ind App 46, 51 NE 380, 69 Am St Rep 340; *Rzeppa v. Seymour*, 230 Mich 439, 203 NW 62; *Mitchell v. Bridgman*, 71 Minn 360, 74 NW 142; *Emrich v. Ireland*, 55 Miss 390; *Scholl v. Kinitzer*, 83 Wis 307, 53 NW 450. Annotation: 130 ALR 1035.

Thus, it is held that buildings of a permanent character erected upon the lands of another through mistake as to the line of boundary, become a part of the freehold and pass to a subsequent purchaser of the land. *Blair v. Worley*, 2 Ill 178; *Seymour v. Watson*, 5 Blackf(Ind) 555, 36 Am Dec 556; *Burlerson v. Teeple*, 2 G Greene(Iowa) 542; *Mitchell v. Bridgman*, 71 Minn 360, 74 NW 142; *Kimball v. Adams*, 52 Wis 554, 9 NW 170.

It was held in *Rotan Grocery Co. v. Dowlin*, 77 SW 430, (Tex Civ App), that a house placed without consent upon private land of another has been held to be a fixture belonging to and passing with the realty even though the one placing the house thereon did so under the mistaken belief that he was locating it upon a public alley belonging to the city, his intent being to use the building for storage purposes and to acquire title to the land by limitation.

In *Climer v. Wallace*, 28 Mo 556, 75 Am Dec 135, it was held that a grantee of a farm, taking same without notice of an agreement between the grantor and an adjoining landowner that a rail fence which the latter built on the grantor's land, by mistake as to boundary, intending it to be a partition fence, should remain the property of the builder, acquired title to the fence as a fixture passing with the land, and could recover damages on account of adjoining landowner's removal of the rails onto his own land.

Purchasers of land at a foreclosure sale have been unsuccessful in attempting to establish property rights or interests in structures which the mortgagor placed upon adjoining land through mistake as to location. *Alamance v. Edwards*, 217 NC 251, 7 SE(2d) 497.

The surrounding circumstances should be carefully explored to discover any evidence of participation or inducement on the part of the landowner. Where the landowner or his agent participates in or induces the mistake whereby a

structure is erected on his land by one having no interest therein, it has been held that an agreement on the landowner's part that the structure shall remain the property of the builder will be implied, even though the landowner acted under a mistaken belief as to the true boundary of his premises. *Karpil v. Robinson*, 171 Minn 318, 214 NW 59.

Thus, it has been held that where the parties are mutually mistaken as to the true location of boundary lines, and the landowner participates in the mistake by erroneously pointing out the supposed boundary to the builder's surveyor, resulting in an erroneous survey and the erection of a structure upon the wrong lot in reliance thereon, the structure, although becoming a part of the realty to which it is so affixed, may be removed by the builder upon payment of the damage accruing to the land upon which it was erected through mistake. *McCreary v. Lake Boulevard Sponge Exch. Co.* 133 Fla 740, 183 So 7.

In *Matson v. Calhoun*, 44 Mo 368, it is held that a rail fence erected by defendant as a partition fence on the supposed dividing line of adjoining lands, but disclosed by a subsequent survey to be on the plaintiff's land, did not become plaintiff's property where defendant in building it acted upon the license and permission of the plaintiff, and upon discovery of the mistake moved it to the true line within a reasonable time.

Some decisions also hold that an agreement permitting a builder to remove a structure placed in good faith upon another's land through mistake as to location will be implied where the landowner is aware of the erection or placing of the structure and acquiesces in its location by failing to make objection to the builder, even though such acquiescence arises from the landowner's mistaken belief that the location of the structure is not within the boundaries of his land. *Lowenberg v. Bernd*, 47 Mo 297; *Ousley v. Lambeth* (Mo App) 199 SW 594; *Matson v. Calhoun*, 44 Mo 368; *Long v. Cude*, 75 Tex 225, 12 SW 827.

Judgment for the plaintiff was affirmed in *Ousley v. Lambeth*, 199 SW 594 (Mo App), where it appeared that the plaintiff intended to build a wire fence along the line of his farm, but located it in reliance upon a stone which had for many years been recognized as the corner between the lands of the plaintiff and the defendant, so that, as a survey subsequently

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revealed, some 60 rods of the fence stood wholly on defendant's land, and defendant then refused to permit plaintiff to remove it, whereupon plaintiff brought an action of replevin for such portion of the fence.

It has also been held that an agreement permitting a builder to remove a structure placed in good faith upon another's land through mistake as to location will be implied where the landowner knows of the placing of the structure and acquiesces in its location and maintenance by failing to make any objection for a considerable period of time, even though his acquiescence results from his mistaken belief that the structure is so located as not to be upon his land. *Revell v. Herron*, 105 Pac(2d) 426 (Okla).

A landowner's acquiescence in the maintenance of a fence after a survey showed it to be upon his land, coupled with his notification directing the one who built the fence upon his land through mistake to remove it, has been held to be equivalent to an original agreement permitting it to be located on his land, so as to amount to an acknowledgment on the part of the landowner that the fence rails remained the personal property of the builder. *Hines v. Ament*, 43 Mo 298.

There is authority for the view that although, between one placing a structure of a permanent nature upon the land of another through mistake as to location and the owner of the land at the time of the placing of the structure thereon, there may have been an express or implied agreement permitting the maintenance and removal of the structure by the builder, a third person subsequently acquiring title to the land without notice of the builder's rights or claims against the structure is not bound thereby and acquires title to the structure as a fixture or improvement belonging to the realty. *Climer v. Wallace*, 28 Mo 556, 75 Am Dec 135; *Bast v. Mason*, 165 Mo App 718, 148 SW 398; *Schmuck v. Beck*, 72 Mont 606, 234 P 477.

TRIAL GUIDE

BUSINESS OR PROFESSION, MEASURING EARNING CAPACITY

- You are the plaintiff in this action?
- In what business or profession are you engaged? A—I am an attorney at law.
- For how long have you been a practicing attorney?
- Were you in active practice at the time of the injury in this case?
- Describe the nature of your practice.
(Develop any speciality or specialized skill.)
- For how long have you followed that specialized type of law practice?
- Were you in practice for yourself at the time of this injury?
- For how long a period of time have you maintained your own office?
- For the period of twelve months preceding this injury, did you keep any record of your earnings?
(How was record kept, who kept record, etc.)
- Q—Are you able to state the amount of your earnings for the month immediately preceding the accident?
- Q—Can you state the amount of your earnings for the six months' period immediately preceding the accident?
- Q—Now please tell us the amount of your earnings for the year preceding the accident?
- (The witness may use his records to refresh his recollection, without offering same in evidence; where he has no independent recollection, counsel should be prepared with adequate proof of the accuracy of the records, and manner in which same were kept for the period in question.)
-

The loss or impairment of earning capacity is an important element to be developed in actions for personal injuries. There is ordinarily no difficulty in establishing this proof where the plaintiff is a wage earner, with a fixed weekly or monthly return, and with definitely prescribed duties or a special skill. The rule of law to apply is not so clear where the plaintiff is engaged in business for himself. Broadly speaking, the proper measure of damages in such cases is

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gauged by the income or profit that is traceable to, or derived from, the personal skill and knowledge of the plaintiff; exclusive of the profits or income derived from the labor of other persons, or the return on invested capital. *Baxter v. Philadelphia & R. R. Co.* 264 Pa 467, 107 Atl 881, 9 ALR 504.

In *Grant v. Brooklyn*, 41 Barb (NY) 381, where the plaintiff was engaged in the business of erecting calcium lights, it was said:

"I see no other way of doing this so certainly and effectually as by showing the net income of the plaintiff for services for the preceding year. This received income was a fact, and although inconclusive, yet it afforded some data from which the jury might estimate the amount of the loss. Suppose that, in place of working for himself, the plaintiff had been employed by others during the previous year at a fixed compensation, it would have been competent for him to prove how much that fixed compensation was. In principle, there is no difference between the two cases. Indeed where the damages are for the loss of services, I see no evidence so unobjectionable and so reliable as that which shows how much the party was earning from his business, or realizing from fixed wages, at the time to which the loss refers."

A good summary of the law upon this point is contained in the following holding:

"In actions for personal injuries, the loss of earning power is an important element to be considered in estimating the damages suffered. As stated in many of our cases, the value of the earning power contemplated is that resulting from the intellectual or bodily labor of the injured party, in his business or profession. Profits derived from invested capital, or the labor of others, are clearly excluded. Earnings are the result of labor, the price of services performed. Profits are the net gains from an investment, or the prosecution of some business. Profits should not be used as a safe guide for measuring earning power, although they may indicate the possession of business ability and qualifications. Strictly speaking, compensation for the loss of earning power, as far as possible, should be limited to earnings which are the result of personal effort, either physical or mental, in which profits from invested capital or profits from the labor of others must not be included. Where it is impossible, in a business enterprise, to distinguish between

the personal earnings of the individual and the return from capital invested and the labor of others, the net income, or net result from such business, cannot be considered in determining the amount of damages to which the claimant is entitled. But where the predominating factor is the directing intellectual and physical labor of the individual, such business may be characterized as personal to that individual, though others with tools and equipment may aid in the work. It is much like dentists and doctors with their instruments, or lawyers with their books and stenographers and assistants. The personal feature prevails over the investment of an insignificant amount of capital or labor employed. Such capital and labor are incidental, though important, to the performance of the personal services. It is the latter which makes the practice successful; it is the service of the individual that is the real life of the business or the profession."

"The idea of personal effort, physical and mental, is not confined to professional or similar services. It extends to a person engaged in a business, as, when the neighborhood blacksmith shoes a horse correctly, he may count on the continued patronage of the horse owner, though in his shop he may have such assistants as his business demands, and his business thrives not only through services well done and because of personal friendship or relationship but because it, or any other like place, fills the community demand. It is the worth of this individual's connection with the business that causes the trouble in ascertaining a fair criterion for estimating earning power. The difficulty comes not from expressing the rule to govern, but in applying it to a given case. Difficulties, however, should not prevent the application of the rule to a just and reasonable extent. It must be remembered the general rule is that the worth of earning power, as applied to a business, must not be made up from profits, which represent earnings from invested capital, or the labor of others, or both."

"In all of the cases where earning power may be measured in part by profits, it cannot be done with the certainty that a daily or monthly wage is fixed, either in connection with the business directly under consideration or apart from and attached to another business. The yearly value of the services of one who owns, manages, and labors with others, with invested capital, is subject to many conditions which do not

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confront us in the ascertainment of the earning power, when we consider a monthly wage, or the earnings of professional men, or men engaged in similar occupations. The owner of a business encounters the continued financial requirements of his undertaking; the effect of business depression, with its attendant loss, the destroying influence of competition, labor conditions, market supply, prices and loss through ordinary business attention, such as loss through unwise contracts, unused supplies, or materials, etc.,—these, with other factors, are the deterring circumstances in business enterprises.” *Baxter v. Philadelphia & R. R. Co.* 264 Pa 467, 107 Atl 881, 9 ALR 504.

It is clear that no broad and general rule can govern each situation that will arise in this connection. Each “case must depend on the nature and extent of the business, the amount of personal direction and labor of the party engaged in connection therewith, as well as the amount of capital invested and the labor employed. The effect of the loss of the individual’s services to the business may be indicated by evidence pointing out the pecuniary loss sustained by reason of the absence, partial or total, of the personal attention and labor of the individual; not as definitely fixing the measure to value the earning power, but as an aid to the jury, after considering all the attendant circumstances involved in the business, in its effort to determine what the measure should be. Attention may be called to all the depressing influences to which a business is subjected. If, because of the magnitude and complexity of the business, or through death, or otherwise, this evidence be not available, then the claimant, after fully describing the business and the injured person’s connection therewith, should be permitted to show what the services were worth, if employed under like circumstances by another in a similar capacity.” *Baxter v. Philadelphia & R. R. Co.* 264 Pa 467, 107 Atl 881, 9 ALR 504.

In the instance of a boardinghouse keeper, it has been held:

“The business of the keeper of an established . . . boarding house . . . requires special qualities. Whoever engages in it should have the gift of management, be a good buyer, know how to provide liberally, and not lavishly, possess tact, prudence, and discretion. Such assistance as it is necessary to have generally comes from those employed at fixed wages. There is a fixed rate of charge against each of

the boarders. Rent is a fixed item, unless the house is owned by the one who keeps it, in which case the annual value of its use can easily be shown. The net returns or profits, of such a business are quite as readily ascertained as those arising from the practice of a profession, and are equally a proper subject of proof, in a case like this. They are to be considered simply as bearing on the earning capacity of the person conducting it, and only such can be shown as are susceptible of estimation with reasonable certainty." *Comstock v. Connecticut R. & Light Co.* 77 Conn 65, 58 Atl 465.

A manufacturer may not be allowed to prove what his total business was worth each month. As stated by the court:

"These profits depend upon too many contingencies, and are altogether too uncertain, to furnish a safe guide in fixing the amount of damages. The plaintiff had the right to prove the business in which he was engaged, its extent, and the particular part transacted by him, and, if he could, the compensation usually paid to persons doing such business for others. These circumstances the jury have a right to consider in fixing the value of his time. But they ought not to be permitted to speculate as to the uncertain profits of commercial ventures in which the plaintiff, if uninjured, would have been engaged." *Bierbach v. Goodyear Rubber Co.* 54 Wis 208, 11 NW 514, 41 Am. Rep. 19.

In the case of a professional man, it is generally held that his income and profits may be shown in proof of the value of his earning capacity, upon the theory that the basic producing factor is the individual's own peculiar skill and ability, as well as reputation. *Stafford v. Oskaloosa*, 64-Iowa 251, 20 NW 174; *Holmes v. Halde*, 74 Me 28, 43 Am Rep 567; *Nelson v. Boston & M. R. Co.* 155 Mass 356, 29 NE 586; *Collins v. Dodge*, 37 Minn 503, 35 NW 368; *Walker v. Erie R. Co.* 63 Barb 260. See also cases collected in 9 ALR 518.

"The plaintiff was an architect,—a business depending on his personal services as much as that of a common laborer, a clerk, or a mechanic—and his emoluments were the result of his own earnings. By reason of the injuries he received, he was for a time incapacitated from pursuing his occupation, and sustained damages by reason thereof. These damages resulted proximately from the wrongful act of the defendant's servants, and obviously should be included in the compensation to be awarded to him. To what extent he had sustained

pecuniary injury in that respect must depend upon the nature and extent of his business, and the jury would not be in a condition to reach any correct conclusion on that subject, unless they had before them some evidence of the value of the services to himself." *New Jersey Exp. Co. v. Nichols*, 33 NJL 434, 97 Am Dec 722.

A similar rule has been applied in the case of a dentist where it was held that evidence was competent of the amount of his earnings.

Nash v. Sharpe, 19 Hun(NY) 365, where it was held: "If there is any distinction between the earnings of a professional man, and a mechanic or laborer, it is a question of fact to be considered by the jury, in connection with the surrounding circumstances. There is no good reason why a professional man should not be permitted to show what he was earning from his business at a time to which the loss refers, as well as a laboring man who is employed under fixed wages. This must be so from the nature of the case, otherwise a professional man could give no reliable and satisfactory evidence of his loss."

A farmer may show the extent of his business, and the profits that he derives therefrom, in order to afford a guide to his earning capacity. *Escher v. Carrol County*, 146 Iowa 738, 125 NW 810.

It is essential that the proof submitted be clear and definite, whether on profits or income from professional earnings; estimates based on vague conjectures or guesses are improper, and where admitted, are of weak probative value and easily impeached. The proof should also be referable to a period of time not too remote from the time the injury was sustained. *Comstock v. Connecticut R. & Light Co.* 77 Conn 65, 58 Atl 465; *Escher v. Carrol County*, 146 Iowa 738, 125 NW 810; *Stafford v. Oskaloosa*, 64 Iowa 251, 20 NW 174; *Holmes v. Halde*, 74 Me 28, 43 Am Rep 567; *Nelson v. Boston & M. R. Co.* 155 Mass 356, 29 NE 586; *Collins v. Dodge*, 37 Minn 503, 35 NW 368; *Walker v. Erie R. Co.* 63 Barb 260; *New Jersey Exp. Co. v. Nichols*, 33 NJL 434, 97 Am Dec 722.; *Baxter v. Philadelphia & R. R. Co.* 264 Pa 467, 107 Atl 881, 9 ALR 504; *Bierbach v. Goodyear Rubber Co.* 54 Wis 208, 11 NW 514, 41 Am Rep 19. See also cases collected in 9 ALR 510.

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CARRIER, DELAY IN SHIPMENT

- Q—You are the plaintiff in this action?
- Q—Were you the owner of the following property on January 3rd, 1943?
(Specify in detail the nature and character of the property involved in the action.)
- Q—Did you have any conversations with an officer of the defendant railroad company on or about that date respecting shipment of that property?
- Q—With whom were such conversations had? A—With John Rose and William Brown.
- Q—Do you recall the exact date of these conversations?
- Q—Where were they held?
- Q—Tell us the nature of these conversations.
- Q—I show you a paper, dated January 4th, 1943, and ask if you recognize this as your signature.
(Marked in evidence.)
(Develop in full any facts and circumstances which show knowledge on part of the carrier of matters relating to the shipment, not contained in the written contract.)
- Q—Did you thereafter deliver any part of the goods you have just described to the defendant?
- Q—When did this occur?
- Q—What was the destination of the goods?
- Q—Describe the condition of the goods at that time?
- Q—Do you know whether the goods were delivered at their destination?
- Q—When was such delivery made?
(Show nature of delay, character of loss or damage, and proximate relationship between the delay and alleged loss.)
-

A carrier that undertakes to deliver or transport property to a specified destination impliedly agrees to execute its contract within a reasonable time. *Ritchie v. Oregon Short Line R. Co.* 42 Idaho 193, 244 Pac 580, 45 ALR 909; *Louisville N. A. & C. R. Co. v. Flanagan*, 113 Ind 488, 14 NE 370, 3 Am St Rep 674; *Ward v. New York C. R. Co.* 47 NY 29, 7 Am Rep 405. See also 9 Am Jur p 725, § 502. Precisely what constitutes reasonable time is dependent upon the facts and cir-

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cumstances of each case, *Yazoo & M. Valley R. Co. v. Blum*, 88 Miss 180, 40 So 748, no less than the rule that negligence in performance of its agreement to transport and deliver depends upon the exigencies of each situation. Annotation: 55 ALR 905.

Factors which aid in determining what constitutes a reasonable time, but are not necessarily conclusive thereof, are:

1—Distance to be covered, from point of pick-up to place of delivery.

2—Route to be followed in making delivery.

3—Nature of the goods, whether perishable, highly perishable, etc.

4—The season of the year in which the goods are accepted for delivery, as well as weather conditions at that time and during transit.

5—The available means of transportation, and the character of the facilities open to the carrier.

6—The presence of unforeseen factors which may affect the normal delivery and transportation system of the carrier, as war shipments, strikes, floods, etc.

Johnson v. Missouri P. R. Co. 211 Mo App 564, 249 SW 658.

Thus, it has been pointed out that what might constitute an unreasonable delay in shipment of such perishables as oysters, vegetables, fish, etc., would not be construed as an unreasonable delay in the instance of such goods as furniture, iron, cotton, etc. Each case will spin its own pattern of reasonable care in this respect. 9 Am Jur 726, § 503.

A carrier stands in many respects in the same position as an ordinary bailee, where it accepts goods for delivery to a specified destination, and makes no agreement as to date of delivery.

In the event that two types or character of property are delivered at the same time to the carrier for shipment, one perishable and the other nonperishable, the rule is that the carrier should ship the perishable goods first, unless the surrounding circumstances make such action impracticable or impossible. *Peet v. Chicago & N. W. R. Co.* 20 Wis 594, 91 Am Dec 446.

In some jurisdictions statutory provisions exist with reference to the shipment of specific types of commodities, as livestock for example. Counsel should thoroughly familiarize

himself with all statutory provisions of this character before drawing any pleadings or framing his cause of action.

It should be noted that a mere delay in shipment of goods entrusted to a carrier does not, standing alone, support a cause of action against the carrier, for breach of its contract to deliver, unless it can be further shown that such delay constituted the proximate cause of the damage or loss complained of. *Young v. Maine C. R. Co.* 113 Me 113, 93 Atl 48. To illustrate, it has been held that where an alleged loss or damage is directly due to the act of the shipper, the delay of the carrier will not be regarded as the proximate cause so as to impose liability upon the carrier. 9 Am Jur p. 730, § 508.

The damages which a shipper may recover for loss, or damage, due to a failure of the carrier to fulfill its contract of delivery, are necessarily limited to those which may be regarded as proximately resulting from such failure to execute its contract. *Florida East Coast R. Co. v. Peters*, 72 Fla 311, 73 So 151; *Williams v. Atlantic Coast Line R. Co.* 56 Fla 735, 48 So 209. Stated differently, it is only such damages as may fairly be viewed as being in the minds of the parties when the contract of shipment was made, as may be recovered in the event of the carrier's failure to perform its contract. *Ibid.*

Where there is a failure on the part of the carrier to make shipment on time, and the goods entrusted to it have a market value, the courts have held that the measure of damages recoverable in such cases is the diminution in market value of the goods between the time when they should have been delivered, and the time when they were actually delivered. *Sisson v. Cleveland & T. R. Co.* 14 Mich 489, 90 Am Dec 252; *Deming v. Grand Trunk R. Co.* 48 NH 455, 2 Am Rep 267.

To this may be added such reasonable expense as is directly attributed to the delay of the carrier in transporting the goods. *Ibid.*

The above rule as to the measure of damages recoverable is varied in the case of a shipment for a specific purpose, with special circumstances distinguishing it from the normal character of goods, and it appears that such special circumstances are made known to the carrier. *Harper Furniture Co. v. Southern Exp. Co.* 148 NC 87, 62 SE 145. In such cases the carrier is liable for all damages which may fairly be construed

as being in the minds of the parties at the time they made the contract. *Ibid.*

There is no specific rule which will define what constitutes sufficient notice to the carrier of special circumstances affecting a shipment, or imposing a greater need for haste in shipping. Nor is there any rule which says such notice must be specifically given to the carrier in all instances; it may well be that the surrounding circumstances and the negotiations of the parties have operated to give the carrier ample notice in this connection. *Harper Furniture Co. v. Southern Exp. Co.* 148 NC 87, 62 SE 145.

The plaintiff should be prepared with evidence showing the nature of the negotiations between the parties prior to the actual contract, and any proof that would tend to show knowledge on the part of the carrier of exigencies making imperative a prompt compliance with the contract of shipment, as letters, telegrams, etc. Similarly, ample proof should be adduced to show the nature of the loss sustained by the plaintiff, and to what extent such loss may be traced to the negligence of the carrier or its failure to execute the contract of shipment in the time specified.

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CARRIER, LIABILITY AS WAREHOUSEMAN

- Q—You are the plaintiff in this action?
- Q—Did you, on or about June 30th, 1943, have any conversations with the defendant regarding transportation of the following:
(Enumerate and describe in detail.)
- Q—Following these conversations, did you enter into any agreement with the defendant regarding shipping of these products?
- Q—With whom were these conversations held?
(Fix time and place.)
- Q—I show you a paper, dated July 1st, and ask if you recognize this paper?
(Counsel should fully develop all matters explanatory of any duties imposed on carrier during storage of goods, pending transit.)
- Q—When were these goods delivered to the carrier?
(Show perishable nature of goods.)
- Q—What was the prevailing temperature at the time such goods were delivered to the defendant?
- Q—Do you know, of your own knowledge, where this property was kept by the defendant?
- Q—Do you know where the defendant stored these goods?
- Q—Did you make any request of the defendant respecting the manner in which the goods were to be stored?
- Q—Did you ask to inspect the goods during storage? A—
Yes.
- Q—When did you make such inspection?
- Q—Please describe for the court and jury how this property looked to you when you saw it.
- Q—Describe the place where you found the goods.
(All factors indicative of lack of care on the part of defendant in storage of goods should be fully brought out.)
-

Where goods are delivered to a carrier for shipment to a specified destination, and during the interval between receipt of the goods and actual transit of same, the property is lost or damaged, courts have held that the carrier is liable only upon proof of negligence or lack of due care in keeping and

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safeguarding the goods. *Boies v. Hartford & N. H. R. Co.* 37 Conn 272, 9 Am Rep 347; *Lewis v. Louisville & N. R. Co.* 135 Ky 361, 122 SW 184.

The carrier is not an insurer of the safety of the goods entrusted to it and the relationship existing during the period described is closely analagous to that of a bailee or ordinary warehouseman. *Ibid.*

The mere fact of a loss of goods while awaiting actual shipment will not operate to impose liability upon a carrier. *Basset v. Connecticut River R. Co.* 145 Mass 129, 13 NE 370; *Tarbell v. Royal Exchange Shipping Co.* 110 NY 170, 17 NE 721.

Thus, a carrier is not liable for goods lost during a fire, where it appears that only unusual and out of the ordinary safeguards would have served to prevent the loss; or that the fire occurred while the defendant was following the regular practices of carriers in the storage of goods pending actual transit. *Charnock v. Texas & P. R. Co.* 194 US 432, 48 L ed 1057.

The inquiry as to what constitutes reasonable care on the part of the carrier, or the character of the acts that will impose liability, depends upon the exigencies of each case. Factors that must be evaluated in this connection are:

- 1—The nature of any agreements between the parties respecting the relationship created during the interval between receipt of the goods and actual shipment.
- 2—The nature of the goods, whether perishable, highly perishable, etc.
- 3—The character of the place where the goods were stored.
- 4—The safeguards adopted by the carrier relative to storage or handling of goods.
- 5—Value of the property left with the carrier.

Turrentine v. Wilmington & W. R. Co. 100 NC 375, 6 SE 116; *Dunlap v. Great Northern R. Co.* 34 ND 320, 148 NW 529; *Houston & T. C. R. Co. v. Adams*, 49 Tex 748, 30 Am Rep 116. See also 9 Am Jur p. 826, No. 671.

Thus, failure of the carrier to properly ventilate perishable goods left with it prior to actual shipment, may impose liability upon it where such neglect causes loss of the goods. *Dunlap v. Great Northern P. R. Co.* 36 Wash 21, 77 Pac 1087.

The proof should make clear that the loss or damage was incurred while the goods were actually within the custody or

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control of the defendant; where it appears that the goods have already been placed in the hands of the consignee, no liability exists on the part of the carrier. *Goodwin v. Baltimore & O. R. Co.* 50 NY 154, 10 Am Rep 457.

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CARRIER, LIABILITY FOR IMPROPER PACKING OR CRATING

Q—You are the plaintiff in this action?

Q—In what business are you engaged? A—The manufacture of glass fixtures.

Q—Did you, during the month of May 1943, have occasion to deliver a shipment of glass containers to the defendants in this action? A—Yes.

Q—Do you recall the exact date you made this delivery? A—May 9th, 1943.

Q—Will you please describe this shipment, as near as you can recall.

(The precise manner in which goods were packed or crated should be outlined in detail.)

Q—Were you present at the time of receipt of this shipment by the defendant in this action?

Q—Will you please tell us, as near as you can recall, what conversations, if any, took place between you and a representative of the defendant, with respect to this shipment? A—I noticed that one of the crates lacked a wooden bracket support and mentioned this to the freight agent, etc.

(A carrier that knowingly accepts for shipment goods which are improperly packed, may not thereafter set up such fact in an action for loss or damage to the goods. See text.)

(The full extent of the damage to the goods should be developed at the trial, as well as any facts establishing the proximate relationship between such damage and any acts of negligence on the part of the defendant.)

The rule has been stated by many decisions that, except for local statutory provisions to the contrary, or an act of God, a common carrier is an insurer of the safe carriage of goods entrusted to his care for the purpose of shipment. To these exceptions must be added the well recognized rule that where the loss or injury of shipment is due to the improper packing or packaging of goods, the carrier is not liable for consequent loss. *Alabama & V. R. Co. v. American Cotton Co.* 249 Fed 308; *Broadwood v. Southern Exp. Co.* 148 Ala 17, 41 So 769; *Mitchell v. North Pacific S. S. Co.* 60 Cal App 554, 213 Pac 293; *S. Valentine & Co. v. Atchison, T. & S. F.*

R. Co. 222 Ill App 188; *Bradley v. Lake Shore & M. R. Co.* 145 App Div 312, 129 NY Supp 1045.

Thus, in one case involving damage to a shipment of eggs packed in a barrel, it was held that the court properly charged the jury that "if the loss was owing to the want of care or skill of the plaintiffs in packing the eggs or in coopering the barrel, or if there was an inherent defect in the barrel at the time when it was delivered to the agent of the railroad company, and the head fell out by reason of such defect whilst he was, with due care and caution, moving it into the car for transportation, the defendants are not liable for the loss." *Culbreth v. Philadelphia, W. & B. R. Co.* 3 Houst (Del) 392.

But the law does impose certain duties on the carrier with respect to receipt of goods for shipment. It may not rely blindly on the supposition that each package of goods or article readied for shipment may be transported in the usual and customary manner.

In the event that "defects in a shipment are perfectly apparent, it is the carrier's duty to refuse the shipments, and, having elected to carry them in a defective condition, the carrier will not be allowed to urge these defects as a defense." *S. Valentine & Co. v. Atchison, T. & S. F. Ry. Co.* 220 Ill App 188.

The rule is elsewhere stated to be that "if goods presented for carriage are not properly packed, and that fact is apparent to the carrier or his servants upon ordinary observation, then the carrier may refuse to receive the goods in that condition; but, if he does see fit to receive them, he assumes to carry them as they are, and his full common-law liability as carrier attached to the contract of carriage." *Northwestern Marble & T. Co. v. Williams*, 128 Minn 514, 151 NW 419.

In one case the court drew a distinction between the care that a shipper owes with respect to the wrapping, packing, and labelling of a shipment, and the duty that a carrier owes in the external protection of such shipment. It was here pointed out:

"What is meant when it is said that, if goods are improperly packed, the carrier will not be liable for injuries resulting from that cause? Is it meant that, if the goods are of a nature to be injured by rain, they must be secured by waterproof covering or cases? It was argued in this case that, because the goods were of that nature, and the shipper did not

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pack them in wooden boxes or other waterproof covering, so as to guard against the ordinary contingency of rain when they were transferred from cars to wagons, and from wagons to cars or warehouses, in the course of transit, the company is not responsible for the loss, provided that proper diligence was used in transferring them, so that they received as little injury as possible under the circumstances, the company not having previously provided awnings or other suitable means of protection, so as effectually to have avoided the injury. We believe there is no authority for this position, and that the improper packing which will excuse the carrier signifies some internal or latent defect of which the carrier does not know, and from which loss or damage ensues to the goods in the ordinary course of handling and transportation. A common carrier is an insurer against all damage to or loss of goods entrusted to him for transportation, except such as may arise from the act of God, the act of the enemies of the country, or the act of the owner himself. If there be some hidden defect in the packing, and damage result from that cause, it is the act of the owner, and the carrier is not responsible. But as to the external protection of goods, the owner is not required to cover them so as to be safe against the action of rain, or wind, or fire not happening by the act of God." *Klauber v. American Exp. Co.* 21 Wis 21, 91 Am Dec 452.

"The object of packing is, in general, to secure convenience, safety, and despatch in the handling and transportation, and not to prevent injury from such accidental causes as rain, happening in the course of transit, against which the carrier is presumed to have provided. The owner may, therefore, if he choose, deliver the goods without any external protection; and if he does, and they are of a nature to be injured by the mere handling and carriage in a careful and proper manner, and are so injured, the loss will be his own; but if they are otherwise injured, by rain or other cause for which the carrier is not excused, the loss will fall upon the carrier." *Ibid.*

The rule denying liability in the carrier for loss of, or damage to, goods through the improper packing of the shipment in the hands of the shipper, is frequently stated with the qualification that the defective condition must be such as is not apparent upon reasonable or ordinary observation on the part of the carrier. *Mitchell v. North Pacific S. S. Co.* 60 Cal App

554, 213 Pac 293; *McCarthy v. Louisville & N. R. Co.* 102 Ala 193, 14 So 370, 48 Am St Rep 29.

Thus, in one case it was held that the rule cannot prevail "that the carrier must, at his peril, know that the goods are not in fact safely packed. The shipper usually knows better than the carrier the manner in which the goods have been packed and the manner in which they should be packed; and even though the carrier may have knowledge of some defect in the packing, still, if it is not apparent to the ordinary observation of the carrier or his servants that the goods cannot be safely carried in the condition in which they are presented, the carrier should not be held to take the chances of injury from improper packing." *Northwestern Marble & Tile Co. v. Williams*, 128 Minn 514, 151 NW 419.

In the event that the carrier does accept for shipment goods that are so improperly packed as to make it clear, in the exercise of reasonable and ordinary observation, that such goods cannot be carried safely by the usual and ordinary methods of transportation, it has been held the carrier assumes full responsibility for the safe transportation of such goods. *Atlantic Coast Line R. Co. v. Rice*, 169 Ala 265, 52 So 918, Ann Cas 1912B 389; *Mitchell v. North Pacific S. S. Co.* 60 Cal App 554, 213 Pac 293; *Levine v. Duluth & I. R. R. Co.* 171 Minn 205, 214 NW 17.

"The carrier may, in a proper case, refuse shipment where in unfit condition for transportation. If so, it must be a necessary consequence that, having accepted the shipment as tendered, its duty is unmodified by the character, sufficiency or insufficiency, open to observation, of the packing of the shipment so received for transportation. It follows, of course, that the insufficiency of the crate or box from which the dog escaped, for the purpose here disclosed, was not negligence exonerating this carrier." *Atlantic Coast Line R. Co. v. Rice*, 169 Ala 265, 52 So 918.

The rule in this respect is aptly stated as follows:

"There is some authority for this proposition that the full duty of the carrier is simply to carry goods in the condition offered, though the defect in loading or packing is apparent, and that if, in such case, injury results from such defective loading or packing, the carrier is relieved. . . . The better and the more general rule seems to be that if goods presented for carriage are not properly packed, and that fact is apparent

to the carrier or his servants upon ordinary observation, then the carrier may refuse to receive the goods in that condition; but if he does see fit to receive them, he assumes to carry them as they are, and his full common-law liability as carrier attached to the contract of carriage." *Northwestern Marble & Tile Co. v. Williams*, 128 Minn 514, 151 NW 419.

According to some authorities, a carrier that receives for shipment a defectively packaged or wrapped article, cannot relieve itself from liability merely by entering into an agreement with the shipper to transport the goods at the owners risk. *Union Exp. Co. v. Graham*, 26 Ohio St 595.

"The plaintiff in error, while engaged in the business of a common carrier, could not by agreement divest itself of that character. The only effect of the agreement was to relieve it from the liabilities imposed by the common law on public carriers where there was no fault or neglect on the part of the carrier. The carrier may well refuse to receive the property unless it is properly packed. But, if he receives it, the duty attaches of exercising due care for its safe carriage. If, notwithstanding such care, the property should be damaged through the defective packing of the owner, the carrier would be relieved from liability. But where, as in this case, the carrier takes charge of the property for the purposes of carriage, the duty rests on him to show that the injury is attributable to the defective packing, and not to any fault or neglect on his part." *Ibid.*

CARRIER, LOSS OR DAMAGE OF SHIPMENT

(Action to recover value of shipment damaged in transit)

Q—Are you employed by the plaintiff in this action?

Q—What position do you hold? A—Foreman of shipping room.

Q—Did you, on or about the 18th day of August, 1942, have occasion to supervise a shipment of sewing machines sent from your factory?

Q—Do you recall the exact date?

Q—To whom was the shipment consigned?

Q—Did you supervise the packing?

(Establish the condition of the shipment immediately prior to the delivery to the carrier, through qualified witnesses.)

(Describe shipment in detail, showing manner of packing and other pertinent details.)

Q—To whom was the shipment delivered?

Q—What agreement, if any, was made between the carrier and your company, relating to the shipment of these goods?

(Produce and mark in evidence all writings and memoranda relative to the agreement of transportation between carrier and plaintiff.)

Q—Do you know of your own knowledge whether the consignee received these goods? A—Yes, I received word that he rejected the shipment, due to the cracking of several machine heads, etc.

Q—How long after the date of shipment did you learn these facts?

Q—Did you inform the defendant of these facts?

Q—Whom did you inform, and upon what date?

(In what form was notice given, and how does this conform to the requirements of any stipulations between the parties.)

Q—Did you thereafter have occasion to examine the shipment of machines?

Q—When was the first time following shipping that you examined these goods?

Q—Where were the machines at the time you made such examination?

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Q—Please tell this court and jury the condition of the machines as you observed them at that time and place.

(The value of the shipment at time of delivery, and the value thereof in the damaged state should be established through competent testimony.)

The proof in actions against a carrier for loss or damage of a shipment should make clear the nature of the contract entered into between the parties, the character of the goods delivered to the carrier for shipment, the condition and value thereof at the time of delivery to the carrier and at time of loss or in the damaged state, and the full circumstances surrounding the loss or damage, so far as the plaintiff is able to show.

For procedure in actions grounded in negligence, see companion volume, "Trial Manual for Negligence Actions" by same author.

A common problem in cases of this character revolves around the valuation clause in the carrier's contract, and its application to the facts in the case. The courts are not fully agreed as to whether a valuation clause in a carrier's contract of carriage is a limit, or a ratio, of recovery in case of partial loss.

According to one view, where a contract of carriage contains a valuation clause, but there is no express provision as to a partial loss, the shipper may recover only such proportion of the agreed valuation as the actual value of the articles lost bear to the actual value of the whole. *Western Transit Co. v. Leslie*, 242 US 448, 61 L ed 423; *Shelton v. Canadian Northern R. Co.* 189 Fed 153; *Brown v. Cunard S. S. Co.* 147 Mass 58, 16 NE 717; *Fielder v. Adams Exp. Co.* 69 W Va 138, 71 SE 99. Annotation: 41 American Law Reports 450.

Thus, where a contract with a carrier for the transportation of baggage limits the carrier's liability to \$200, and a loss of about \$113 occurs from a trunk containing property alleged to be worth \$675, the measure of recovery is the proportion of \$200 which the value of the lost articles bears to the value of the entire baggage checked, since the agreed valuation of \$200 does not fix an arbitrary limit of recovery, but a ratio. *Robidoux v. Chicago, etc. R. Co.* 204 NW 870 (Neb.)

There are other decisions which hold that in the event of

partial loss the valuation clause of a contract of carriage is to be construed as setting the limit of the recovery for such partial loss; stated differently, that the actual value of the articles lost may be recovered, except that such recovery may not exceed in any event the agreed valuation. *Central of Georgia R. Co. v. Broda*, 190 Ala 266, 67 So 437; *Olcovich v. Grand Trunk R. Co.* 179 Cal 332, 176 Pac 459; *Georgia, etc. Co. v. Reid*, 91 Ga 377, 17 SE 934; *Fox v. Chicago, etc. R. Co.* 199 Ill App 453; *Buffington v. Wabash R. Co.* 118 Mo App 476, 94 SW 991; *Nelson v. Great Northern R. Co.* 28 Mont 297, 72 Pac 642; *Castner v. Oregon-Washington R. & Nav. Co.* 89 Wash 694, 155 Pac 167.

Where it was shown that cattle were valued at \$30 a head and that it was agreed that in no event should the liability of the carrier exceed \$1,000 it was held that the plaintiff, upon showing damage to the cattle, was not restricted to recovering such proportion of the agreed value of \$30 a head as the actual damage bore to the actual value, but rather could recover for the actual damage done, not to exceed \$1,000. *Castner v. Oregon-Washington, etc. Co.* 89 Wash 694, 155 Pac 167.

Thus, it was stated that "under a contract of shipment fixing the value and limiting the liability of the carrier to that value, in case of loss of a part of the shipment, the shipper may recover the real value of the property lost, not exceeding, however, the limit of the liability stipulated in the contract of shipment." *Visanska v. Southern Exp. Co.* 92 SC 573, 75 SE 962.

Courts recognize the purpose of a stipulation requiring notice of a claim for damages to a shipment as an attempt to ascertain the true extent of damage sustained, and prevent any enlargement of liability; rather than an effort to avert liability in the first instance. *St. Louis, etc. R. Co. v. Starbird*, 243 US 592, 61 L ed 917; *St. Louis, etc. R. Co. v. Furlow*, 89 Ark 404, 117 SW 517; *Atchison, T. S. F. R. Co. v. Wright*, 78 Kan 94, 95 Pac 1132; *Osterhoudt v. Southern P. R. Co.* 47 App Div 146, 62 NY Supp 134. Annotation: 1 ALR 900.

Thus, it has been stated that such a stipulation is "addressed to a practical exigency," and is to be "construed in a practical way." *Georgia, F. & A. R. Co. v. Blish Mill. Co.* 241 US 190, 60 L ed 948.

Substantial compliance with such a stipulation is generally

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sufficient; it is not essential to strictly comply with each and every specification of the stipulation. *Georgia, F. & A. R. Co. v. Blish Mill. Co.* 241 US 190, 60 L ed 948, 36 Sup Ct Rep 541; *Atchison, T. & S. F. R. Co. v. Temple*, 47 Kan 7, 13 LRA 362, 27 Pac 98; *Johnson v. New York, N. H. & H. R. Co.* 111 Me 263, 88 Atl 988; *Illinois C. R. Co. v. Wm. Atkinson & McD. Co.* 113 Miss 678, 74 So 616; *Illinois C. R. Co. v. Rogers*, 116 Miss 99, 76 So 686, Ann Cas 1918D, 1137; *Hancock v. Chicago & A. R. Co.* 131 Mo App 401, 111 SW 519; *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.* 199 Mo App 520, 201 SW 623; *Southerland v. Atlantic Coast Line R. Co.* 158 NC 327, 74 SE 102; *Shark v. Great Northern R. Co.* 37 ND 342, 164 NW 39; *Missouri, K. & T. R. Co. v. Davis*, 24 Okla 677, 24 LRA(NS) 866, 104 Pac 34; *St. Louis & S. F. R. Co. v. Young*, 30 Okla 588, 120 Pac 999; *Chicago, R. I. & P. R. Co. v. Spears*, 31 Okla 469, 122 Pac 228; *Atchison, T. & S. F. R. Co. v. Robinson*, 36 Okla 435, 129 Pac 20, reversed on other grounds in 233 US 173, 58 L ed 901, 34 Sup Ct Rep 556; *United Brokers Co. v. Southern P. Co.* 86 Or 607, 169 Pac 114, Ann Cas 1918D 814.

This rule applies notwithstanding the stipulation, which by its terms, requires a strict compliance with its provisions. *Chicago, etc. R. Co. v. McElreath*, 169 Pac 628 (Okla.)

The question as to what constitutes sufficient compliance in this connection is obviously dependent upon the facts and circumstances of each case. Thus, it was held in one instance that merely advising a carrier of the bad condition of a shipment, without stating or suggesting who was responsible therefor, or that any claim would be made against such carrier, is not ample notice under a stipulation requiring notification to the railroad of all claims for damage to shipments. *Waxelbaum v. Southern R. Co.* 168 Ill App 66.

Formal language is not essential in giving notice. *The San Guglielmo*, 241 Fed 969; *Hinkle v. Southern R. Co.* 126 NC 932, 78 Am St Rep 685, 36 SE 348; *Phillips v. Seaboard Air Line R. Co.* 172 NC 86, 89 SE 1057 (holding that "a written claim need not be expressed in any special way, so that it is a plain and intelligible statement of the demand"); *United Brokers Co. v. Southern P. Co.* 86 Or 607, 169 Pac 114, Ann Cas 1918D 814.

The institution of an action on a claim for damages within the time specified in a contract of affreightment for the giv-

ing of written notice of a claim has been held to constitute a sufficient notice and presentation of such claim. *Southern Exp. Co. v. Ruth*, 5 Ala App 644, 59 So 538.

The written notice of intention to present a claim for damages need not contain a detailed outline of the injuries sustained or damages suffered, unless the stipulation provides otherwise. *St. Louis, etc. R. Co. v. Starbird*, 243 US 592, 61 L ed 917.

In *Carstens Packing Co. v. Southern P. Co.* 58 Wash 239, 27 LRA(NS) 975, 108 Pac 613, it was held that a failure to mention shrinkage in weight as part of the loss or injury in transportation, in the notice of loss given the carrier, did not prevent a recovery of that element of damage from the carrier, where the notice given specified the injury so that the carrier could, by a prompt investigation, have become fully informed relative thereto.

All items of special damage which the plaintiff is entitled to recover should be fully established at the trial. Ordinarily, it is essential that the special circumstances underlying such damages be known to the parties at the time they made their contract, although it is not essential to recovery of special damages that such circumstances be shown to exist. *Gibson v. Inman Packet Co.* 111 Ark 521, 164 SW 280; *Florida East Coast R. Co. v. Peters*, 72 Fla 311, 73 So 151, Ann Cas 1918D 121; *Bourland v. Choctaw, etc. R. Co.* 99 Tex 407, 90 SW 483; *Williams v. Atlantic Coast Line R. Co.* 56 Fla 735, 48 So 209; *St. Louis, etc. R. Co. v. Bondies*, 64 Okla 88, 166 Pac 179.

Thus, the same result is accomplished where it can be shown that such circumstances may fairly be assumed to have come within the knowledge of the defendant, or were such that the defendant, in the exercise of reasonable care, should have known thereof. *Weston v. Boston & Maine R. Co.* 190 Mass 298, 76 NE 1050, 4 LRA(NS) 569.

Proof that the property or merchandise was in good condition at the time of delivery to the carrier is ordinarily sufficient to establish a prima facie case of liability. *Ross v. Maine C. R. Co.* 114 Me 287, 96 Atl 223; *Chesapeake & Ohio R. Co. v. Crenshaw*, 148 Va 48, 138 SE 467.

But where the action is grounded in negligence, and specific allegations of lack of care in handling are made, it has been

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held that some additional circumstances tending to establish such allegation should be presented at the trial. *Canfield v. Baltimore & Ohio R. Co.* 93 NY 532, 45 Am Rep 268.

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CLEANING ESTABLISHMENT, LOSS OR DAMAGE OF CLOTHING

(See Laundry, Loss or Damage of Clothing)

CLOUD UPON TITLE, ACTION TO REMOVE

(Action to cancel an instrument as a cloud upon title)

- Q—You are the plaintiff in this action?
- Q—Are you the owner of property located at 922 West Avenue, City of Rochester, New York?
- Q—Were you the owner of this property on January 11th, 1942?
- Q—Is this property recorded in your own name?
- Q—Did you on that date enter into an agreement with the defendant in this action?
- Q—Will you please tell this court and jury the nature of that agreement. A—The defendant was to take care of me for the rest of my life, and in return she was to receive my property upon my death.
- Q—Was this agreement later reduced to writing?
- Q—Do you have a copy of that agreement? A—Yes, this is my copy.
- Q—Is this your signature?
- Q—And this is the paper you both signed?
(Marked in evidence as plaintiff's exhibit.)
- Q—As a part of the same transaction, did you deliver a deed to your property to the defendant? A—Yes.
- Q—And this deed is the same instrument to which you make reference in the agreement?
- Q—On what date did you deliver this deed to the defendant?
(Such parts of the agreement in evidence as clarify the escrow delivery of the deed should be read to the jury.)
- Q—Did the defendant continue to care for you?
- Q—For how long a period did this continue?
(The proof should make clear the defendant's failure to comply with the terms of the agreement.)
- Q—Did you make demand for the return of the deed?
- Q—Did the defendant comply with this demand?
(Adapted from *Howlin v. Castro*, 136 Cal 605, 69 Pac 432.)

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(The same line of questioning would apply to an action to set aside a contract, deed or other instrument that has been terminated by rescission or forfeiture due to purchaser's fault or abandonment.)

Courts have recognized a wide variety of conditions as constituting clouds upon title, justifying their removal in a proceeding instituted for that purpose.

A cloud upon title may be defined as a title or encumbrance which appears valid and fully binding, but which is in fact invalid. As stated by one court: "A cloud on title is an outstanding claim or encumbrance which, if valid, would affect or impair the title of the owner, and which appears on its face to have that effect, but which can be shown by extrinsic evidence to be invalid." *Roby v. South Park*, 215 Ill 200, 74 NE 125. See also Annotation: 78 ALR 25.

There is no limitation in law as to the manner in which a cloud upon title may be created, or the precise form which such cloud may assume; each case will spin its own pattern of circumstance in this respect, and if the title or right is found to be imperfect, the courts will regard the same as subject to a cloud.

Recorded plats were held to constitute a cloud upon title in the following cases: *North Bay Shore Land Co. v. Pollard*, 99 Fla 1287, 128 So 809; *Cranston v. McQuiston*, 127 Iowa 104, 102 NW 785; *Suring v. Rollman*, 145 Wis 490, 130 NW 485; *Day v. Swan Point Cemetery*, 51 RI 213, 153 Atl 312.

In *Lowmiller v. Fouser*, 52 Ohio St 123, 39 NE 419, an order of county commissioners establishing a road on the plaintiff's land was held a cloud.

In *Sheaff v. Spindler*, 339 IH 540, 171 NE 632, a decree for registration under the Torrens Law was held to create a cloud.

In *Ellis v. Ellis*, 152 Miss 836, 119 So 304, a fictitious marriage was held to create a cloud.

It is not essential to creation of a cloud upon title that a claim be asserted under the instrument or proceeding involved; any factors which serve to cast doubt upon the validity of such instrument or proceeding, may constitute a cloud upon the title thereof. *Loring v. Hildreth*, 170 Mass 328, 49 NE 652, 40 LRA 30.

A proceeding may also be instituted to prevent the formation of a cloud upon title; equity will act to forestall the creation of a condition which may later serve as the basis of a proceeding to remove as a cloud upon title. *Rea v. Longstreet*, 54 Ala 291; *Maynard v. Henderson*, 117 Ark 196, 173 SW 831, Ann Cas 1917A 1157; *Hayes v. Carey*, 287 Ill 274, 122 NE 524; *Zimmerman v. Makepeace*, 152 Ind 199, 52 NE 922; *Rogers v. Nichols*, 186 Mass 440, 71 NE 950; *Moore v. McNutt*, 41 W Va 695, 24 SE 682; Annotation: 78 ALR 31.

In *Maynard v. Henderson*, 117 Ark 24, 173 SW 831, Ann Cas 1917A, 1157, where the sheriff had issued a certificate of purchase to the defendants, and would, on the expiration of the period of redemption, make a deed, the court, holding that the deed would constitute a cloud, said: "Equity will interpose to prevent the execution of a deed which it would cancel as a cloud, if it were executed."

Accordingly, courts have acted to enjoin a sale under execution of an equitable interest, which was not subject to execution, upon the theory that equity has jurisdiction "to enjoin a sale that would be fruitless to the judgment creditor, and might cloud and complicate the title." *Zimmerman v. Makepeace*, 152 Ind 199, 52 NE 992.

Similarly, equity has acted to enjoin the unauthorized acts of a defendant in altering the grade of a street, upon proof that the assessments for the expense thereof would constitute a cloud upon the complainant's title. *Oakley v. Williamsburgh*, 6 Paige (NY) 262.

It should be noted in this connection that an instrument may create an actual or potential cloud only in so far as the rights of the complainant are concerned, leaving the title fully valid and operative as to all other persons; equity will act in either situation. *Pixley v. Huggins*, 15 Cal 127; *Meyers v. Markham*, 90 Minn 230, 96 NW 787.

The proof should show more than the mere assertion of a right or interest in the title or encumbrance involved, regardless of whether such assertion is embodied in a writing or made orally. *Welles v. Rhodes*, 59 Conn 498, 22 Atl 286. Compare *Laudano v. Laudano*, 108 Conn 37, 142 Atl 407; *Israel v. Wolf*, 100 Ga 339, 28 SE 109; *Waters v. Lewis*, 106 Ga 758, 32 SE 854; *Weyman v. Atlanta*, 122 Ga 539, 50 SE 492; *Parker v. Shannon*, 114 Ill 192, 28 NE 1099; *Allott v. Ameri-*

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can Strawboard Co., 237 Ill 55, 86 NE 685; McCormick v. Chicago Yacht Club, 331 Ill 514, 60 ALR 763, 163 NE 418. But compare Mostoller v. Liver, 201 Ill App 52; Douglass v. Nuzum, 16 Kan 515; See Gerry v. Simpson, 60 Me 186; Nickerson v. Loud, 115 Mass 94; First African M. E. Soc. v. Brown, 147 Mass 296, 17 NE 549; Leeds v. Wheeler, 157 Mass 67, 31 NE 709. See Moran v. Somes, 154 Mass 200, 28 NE 152; Torrent v. Muskegon Booming Co., 22 Mich 354; Bennett v. Hotchkiss, 17 Minn 89, Gil 66. But compare Lovell v. Marshall, 162 Minn 18, 202 NW 64; Andrews v. Landis, 24 Pa Dist R 876; Newman v. Newman (Tex Civ App) 86 SW 635; Walker v. Haley (Tex Civ App) 236 SW 544; Sulphur Mines Co. v. Boswell, 94 Va 480, 27 SE 24; See McGuinness v. Hargiss, 56 Wash 162, 105 Pac 233, 21 Ann Cas 220.

It was stated in Sulphur Mines Co. v. Boswell, 94 Va 480, 27 SE 24, that "A bill will not lie to remove, as a cloud upon the title, a mere verbal claim of an oral assertion of the ownership of property. The clouds upon title which courts of equity remove are instruments or proceedings in writing which appear upon the records, and thereby cast doubt upon the validity of the record title."

Similarly, the mere fear by a property owner that another will assert a conflicting title, right or interest in his property, is insufficient to create a cloud removable in equity. Fox v. Kountze, 58 Neb 439, 78 NW 712; Tysen v. New York, 212 App Div 300, 207 NY Supp 731.

Thus, it was stated: "it does not constitute a cloud upon the title to real estate that those who may be in its actual possession entertain and express different views of the statutes and authorities under which the holder of such title seeks to establish it, than he himself does." Witters v. Sowles, 42 Fed 701.

This is not, however, a hard and fast rule applicable to all situations that may involve an assertion alleged to create a cloud; it is entirely conceivable that such factor may become recognizable as a cloud upon title. Thus, equity has acted to enjoin suits to set aside title where it finds that the actions are instituted in bad faith and that the assertions made therein are unfounded. Roxana Petroleum Corp. v. Colquitt, 34 F (2d) 470.

A cloud upon title may be created by the act of a party in

whose name an instrument or record is entered, amounting to a repudiation of his right or interest therein, or a denial that his signature conveys any right or interest in the property involved. *Shays v. Norton*, 48 Ill 100; *Dausch v. Barker*, 329 Ill 410, 160 NE 765; *Rogers v. Beach*, 115 Ind 413, 17 NE 609; *Mathews v. Sniggs*, 75 Okla 108, 182 Pac 703; *Rich v. Doane*, 35 Vt 125.

There is some authority for the view that a cloud may be created by an assertion of a right, title or interest which depends for its validity upon the construction of an instrument under which the true owner claims title. *Maynard v. Henderson*, 117 Ark 24, 173 SW 831, Ann Cas 1917A 1157; *Bradley v. Swope*, 77 W Va 113, 87 SE 86.

A cloud may be created by an invalidity or defect in a title or proceeding, where such factor is not apparent on the face of the record, but may only be proven by extrinsic evidence. *Hopkins v. Walker*, 244 US 486, 61 L ed 1270; *Echols v. Hubbard*, 90 Ala 309, 7 So 817; *Casper v. Valley Bank*, 28 Ariz 373, 237 Pac 175; *Hare v. Carnall*, 39 Ark 196; *Chase v. Los Angeles*, 122 Cal 540, 55 Pac 414; *Sloan v. Sloan*, 25 Fla 53, 5 So 603; *Shanklin v. Boyce*, 275 Mo 5, 204 SW 187; *Berkin v. Healy*, 52 Mont 398, 158 Pac 1020; *Schoener v. Lissauer*, 107 NY 111, 13 NE 741; *Boon v. Root*, 137 Wis 451, 119 NW 121.

According to most courts, no such cloud exists where the instrument or proceeding is void upon its face, and is patently invalid. *Seeberg v. Norville*, 204 Ala 20, 85 So 505; *Haggart v. Chapman etc. Land Co.* 77 Ark 527, 92 SW 792, 7 Ann Cas 333; *Coleman v. Spring Construction Co.* 41 Cal App 201, 182 Pac 473; *Simmons v. Carlton*, 44 Fla 719, 33 So 408; *Glos v. People*, 259 Ill 332, 102 NE 763, Ann Cas 1914C 119; *Rumble v. Smith*, 66 Misc 298, 121 NY Supp 501; *Hicinbotham v. North Pelham*, 144 App Div 698, 129 NY Supp 715; *Prospect Park & C. I. R. Co. v. Morey*, 155 App Div 347, 140 NY Supp 380; *Whitney v. Considine Investing Co.* 176 App Div 157, 162 NY Supp 507; *Elkhorn Valley Coal-Land Co. v. Empire Coal & Coke Co.* 191 App Div 230, 181 NY Supp 132.

This doctrine is, however, expressly rejected in some jurisdictions. *Gunter v. Walpole*, 65 Colo 234, 176 Pac 290; *Stewart v. May*, 111 Md 162, 73 Atl 460, 18 Ann Cas 856; *Linnell v. Battey*, 17 RI 241, 21 Atl 606; *Barr v. Simpson*, 54 Tex Civ App 105, 117 SW 1041.

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In any event, it is clear that an assertion of a right, title or interest which is not adverse to that of the record holder, does not constitute a cloud. *Hartman v. Reed*, 50 Cal 485; *Hardy v. Sanborn*, 172 Mass 405, 52 NE 517.

Thus, in *Hardy v. Sanborn*, 172 Mass 405, 52 NE 517, a deed by a widow, reciting that her title was derived from the will of her husband, and that the land was free of encumbrances except his debts, was held not a cloud on the title or right of the executor, being subject to his right to sell or mortgage the property under a license of the probate court for the payment of debts and charges of administration.

An undelivered instrument, apparently a valid criteria of title, is obviously a cloud upon such title and may be subjected to equitable scrutiny, with a view to its removal. *Gulf Coal & Coke Co. v. Alabama Coal & Coke Co.* 145 Ala 228, 40 So 397, 7 LRA(NS) 712; *Allen v. Brame*, 98 Ark 287, 135 SW 850; *Brown v. Wilson*, 89 Cal App 764, 265 Pac 351; *Bales v. Roberts*, 189 Mo 49, 87 SW 914; *Howarth v. Howarth*, 67 App Div 354, 73 NY Supp 785.

A cloud upon title is generally held to result from a contract of sale which has been terminated by rescission or by forfeiture as a result of the purchaser's default or abandonment. *Liddle v. Cook*, 209 Fed 182; *Bishop v. Barndt*, 43 Cal App 149, 184 Pac 901; *Hayes v. Carey*, 287 Ill 274, 122 NE 524; *Babb v. Hollingsworth*, 14 La App 273, 129 So 423; *Bales v. Roberts*, 189 Mo 49, 87 SW 914; *Charlton v. Sheil*, 95 Misc 321, 158 NY Supp 944.

Similarly, an abandoned or forfeited option may constitute a cloud, and the same result would follow in the instance of a lease forfeited through default or abandonment. *Hammit v. Virginia Min. Co.* 32 Idaho 245, 181 Pac 336; *Larmon v. Jordan*, 56 Ill 204; *Sea v. Morehouse*, 79 Ill 216; *Ingraham v. Medill*, 168 Ill App 314; *Merk v. Bowery Min. Co.* 31 Mont 298, 78 Pac 519; *Tennant v. Fretts*, 67 W Va 569, 29 LRA(NS) 625, 140 Am St Rep 979, 68 SE 387.

Shannon v. Long, 180 Ala 128, 60 So 273; *Woodward v. Mitchell*, 140 Ind 406, 39 NE 437, 18 Mor Min Rep 158; *Island Coal Co. v. Combs*, 152 Ind 379, 53 NE 452; *Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co.* 162 Ind 15, 62 LRA 895, 67 NE 259, 22 Mor Min Rep 680; *Gray v. Spring*, 129 La 345, 56 So 305, Ann Cas 1913B, 372; *Pendill v. Union*

Min. Co. 64 Mich 172, 31 NW 100; Nickerson v. Canton Marble Co. 35 App Div 111, 54 NY Supp 705; Detlor v. Holland, 57 Ohio St 492, 40 LRA 266, 49 NE 690; Brown v. Wilson, 58 Okla 392, LRA1917B, 1184, 160 Pac 94. Compare Rich v. Doneghey, 71 Okla 204, 3 ALR 352, 177 Pac 86; See Andrews v. Landis, 24 Pa Dist R 876. But compare Stewart's Appeal, 78 Pa 88, 12 Mor Min Rep 491; Wright v. Davis, 145 Va 370, 133 SE 659; See Pyle v. Henderson, 55 W Va 122, 46 SE 791.

Tax sales and tax deeds made after the taxes were duly paid are subject to cancelation as clouds upon title. Boyer v. Gelhaus, 19 Cal App 320, 125 Pac 916; Miller v. Cook, 135 Ill 190, 10 LRA 292, 25 NE 756; Hackney v. Elliott, 23 ND 373, 137 NW 433.

Sales or conveyances by an administrator or executor made without authority, or through fraud, are invalid, and hence removable as clouds upon title. Hodges v. Wheeler, 126 Ga 848, 56 SE 76; Hoffman v. Wheelock, 62 Wis 434, 22 NW 713.

Upon the same theory, instruments executed by an agent, officer or fiduciary, without authority, are clouds upon title; as are any instruments executed under false authority, by fraudulent design, illegal methods, or under a course of action that violates public policy. Lewis v. Weitbrec, 58 Colo 147, 143 Pac 1037.

Thus, mortgages which are invalid due to their usurious rates of interest may be removed as clouds; instruments executed by incompetents may be similarly removed, and a deed executed under a non-existing title or right is clearly invalid and subject to removal as a cloud upon the title of the rightful owner.

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COMMERCIAL VEHICLE, DESTRUCTION
OR DAMAGE

(Proof of loss of use, or rental value)

Q—You are the plaintiff in this action?

Q—Were you the owner of a commercial vehicle bearing New York Registration Number: 6 B-9879, on June 1, 1943?

Q—Describe this vehicle. A—It was a two ton Mack truck, etc.

Q—In what business were you engaged at that time? A—In the general trucking and hauling business.

Q—Are you still engaged in that business?

Q—Did you use the truck I just described in that business?

Q—Please tell us the nature and extent of the use to which you put this truck in your business.

Q—Did you use any other truck in your business prior to the 1st day of June, 1943, the day of the accident? A—No, that was the only truck I used.

Q—After this accident did you observe the condition of your truck? A—Yes.

Q—Describe its general appearance. A—The front was smashed, etc.

Q—Did you engage anyone to do repairs to this vehicle? A—Yes.

Q—Whom did you engage?

Q—How long did these repairs take? A—One month.

Q—Where was the vehicle during that time? A—In the repair shop.

Q—Did you have the use of this car at any time during that period? A—No.

Q—Were you still open for business during that time? A—Yes.

Q—Did you have any delivery orders to fill?

Q—During the time your truck was being repaired, did you have occasion to hire another vehicle?

Q—Describe the vehicle you hired.

Q—From whom did you hire this vehicle?

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Q—For how long a period of time did you use this car?

Q—Was this car used in your business?

(Describe use of vehicle during rental period.)

(Counsel should be prepared to show, by competent testimony, the reasonable value of the rental.)

Where a commercial vehicle is totally destroyed, and it becomes necessary to evaluate the damages sustained, the broad rule is well settled that the measure of damages is the difference in value of the property immediately before and after the injury. *Louisville & N. R. Co. v. Mertz*, 149 Ala 561, 43 So 7; *Horace Wood Transfer Co. v. Shelton*, 180 Ind 273, 101 NE 718; *Weick v. Dougherty*, 139 Ky 528, 90 SW 966; *Donnelly v. Poliakoff*, 79 Misc 250, 139 NY Supp 999; *Perkins v. Brown*, 132 Tenn 294, 177 SW 1158.

The general rule has been well summarized in the following holding:

"In actions for injuries to personal property, the rule of damages, where no circumstances of aggravation are shown, is the difference in the value of the article before and after the injury. If the article is wholly destroyed, its fair market value at the time of its destruction, and a sum equal to lawful interest from that time to the time of the assessment of the damages, make up the amount which the plaintiff is entitled to recover. If the article is only partially destroyed, and the plaintiff retains it, the amount which he is entitled to recover is the difference between the value of the article before it was injured, and its value in its injured condition. To this amount may be added a sum equal to interest from the time of the injury to the time of rendering the verdict. But nothing can properly be added for loss of the use of the article. Such damages are very uncertain. They are not necessarily a direct result of the injury, for the plaintiff may have had no occasion to use the article, or may have been able to supply himself with another equally convenient at little or no expense. They are, at most, not direct, but uncertain and consequential, and to entitle a party to recover such damages in any case, he ought to be required to declare for them, that the other party may have notice of the claim and be prepared to meet it." *McLaughlin v. Bangor*, 58 Me 398. See also: *Louisville & N. R. Co. v. Mertz*, 149 Ala 561, 43 So 7; *Horace Wood Transfer*

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Co. v. Shelton, 180 Ind 273, 101 NE 718; Weick v. Dougherty, 139 Ky 528, 90 SW 966; Donnelly v. Poliakoff, 79 Misc 250, 139 NY Supp 999; Perkins v. Brown, 132 Tenn 294, 177 SW 1158. See also cases collected in 4 ALR 1350.

The most common form of proof as to value upon a specific time, as at the time of the injury for example, is the market value. In some instances, however, market value is not provable, due to the peculiar facts and circumstances of the case. The proof in such cases may be directed to evidence of the original cost of the vehicle, the use to which it has been put since the time of purchase, and its general condition at the time of accident. *Union Pacific D. & G. R. Co. v. Williams*, 3 Colo App 526, 34 Pac 731.

As has been well stated:

"The horses and wagon had been used for some time. There was no general market for second-hand articles of that description. There was no place in the vicinity where they were bought and sold. Appellee had them for his own use. The only way to sell them was to find a man who wanted them. They had a value, notwithstanding there was no market for them. It will not do to say that because such things are not bought and sold in the market, and a market value is, therefore, not susceptible of proof, they can be destroyed, and the owner receive nothing for them. The witnesses were men who bought and used such things in their business of farming, and based their judgment on their practical knowledge; the original cost of the articles, the amount of use to which they had been subjected, and their condition at the time, were taken into consideration, and in this way the witnesses reached an estimate of their value. We are not disposed to say that, because there was no market value which could be proved, therefore appellee should recover nothing; and in the absence of such proof, for the reason that it could not be made, we think that the testimony which was given was competent and proper for the purpose for which it was offered." *Union Pacific D. & G. R. Co. v. Williams*, 3 Colo App 526, 34 Pac 731.

Where the vehicle damaged may be repaired, so as to restore same to the condition it was in before the injury thereto, or at least substantially the same condition, the amount of such repairs will furnish a proper measure of the damages.

Cook v. Packard Motor Car Co. 88 Conn 590, 92 Atl 413;
Berry v. Campbell, 118 Ill App 646.

In one case the rule was stated as follows:

"Where an injury to personal property does not effect its destruction, that is, where it is susceptible of repair, the measure of damages is the difference between the market value of the property immediately before the injury at the place thereof, and its reasonable market value immediately after the injury at the place thereof. Evidence of the reasonable value of such repairs, made necessary by the injury, as were required to place the property in usable condition, as well as evidence of its reasonable market value when repaired, is competent as bearing on the reasonable market value of the machine immediately after the injury. But if the property should be rendered, by reason of the repairs, more valuable than it was before the injury, then, of course, the full expenditure for repairs should not be at the expense of the defendant. On the other hand, if, by reason of the injury, the property has been rendered incapable of being made, by repairing it, as valuable as it was immediately before the injury, the plaintiff should not be required to lose this deterioration." *Southern R. Co. v. Kentucky Grocery Co.* 166 Ky 94, 178 SW 1162.

It is error for the court to allow recovery for the difference between the reasonable market value of the car before the accident and after, in addition to all reasonable expenses incurred by the owner in restoring the vehicle to its usable condition. *Gilwee v. Pabst Brewing Co.* 195 Mo App 487, 193 SW 886.

As stated:

"In measuring the damages to an automobile, the basic rule is just compensation for the actual loss sustained, and, therefore, plaintiff was not entitled to recover for the difference in the market value of the car immediately before the accident and immediately thereafter, and in addition, the cost of repairing the automobile so as to make it, as near as possible, as good a car as it was before the accident; for to permit him to make both of such recoveries would be contrary to the rule that in a suit for damages one cannot be compensated twice for the same loss. Plaintiff was entitled to recover the difference in the reasonable market value of the automobile

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immediately before the injury and immediately thereafter, the cost of preserving the car, and loss of use, if any, of the car for a reasonable period of time until it could be repaired; or for a reasonable repair bill and the amount, if any, of the deterioration of the repaired car, being the difference in the reasonable market value of the car immediately before the accident and the reasonable market value of the same after it had been repaired, and also for the cost of preserving the car and for loss of use, if any, of the same for a reasonable period of time, while it could have been repaired but he could not recover for both." *Ibid*.

Counsel should further note that the true measure of damages with respect to cost of repairs, where such cost is a determinative factor, is not the actual amounts paid, but the reasonable value of the repairs made. *Zellmer v. McTague*, 170 Iowa 534, 153 NW 77.

This distinction was aptly pointed out in one case as follows:

"Without any description of the nature and kind of injury done to the plaintiff's wagon and harness, he was permitted to testify over objection as to what he paid for repairing the same. The fact that he was put to expense and that he paid, or became obligated to pay, was doubtless a material inquiry; but his measure of recovery was not what he paid or was charged, but the reasonable and proper charges for such repairs as were necessitated by reason of the injury to the property. The court instructed that he might recover fair and reasonable damages for the injury done; but, aside from the testimony just referred to, there was no proof as to what these were." *Ibid*.

Where the owner has lost use of the vehicle for a specified period after the injury, he may generally recover the value of such use during that period. *Cook v. Packard Motor Car Co.* 88 Conn 590, 92 Atl 413; *Travis v. Pierson*, 43 Ill App 579; *McLaughlin v. Bangor*, 58 Me 398; *Donnelly v. Poliakogg*, 79 Misc 250, 139 NY Supp 999; *Perkins v. Brown*, 132 Tenn 294, 177 SW 1158.

"Where personal property is injured and not destroyed, the value of the use during the time that the owner is necessarily deprived of it may be recovered." *Fritts v. New York & N. E. R. R. Co.* 62 Conn 503, 26 Atl 347.

The proof should be clear and explicit on the element of loss of use, and showing with reasonable certainty the value thereof. *Cook v. Packard Motor Car Co.* 88 Conn 590, 92 Atl 413; *Travis v. Pierson*, 43 Ill App 579; *McLaughlin v. Bangor*. 58 Me 398; *Donnelly v. Poliakogg*, 79 Misc 250, 139 NY Supp 999; *Perkins v. Brown*, 132 Tenn 294, 177 SW 1158. See also cases collected in 4 ALR 1355.

The expense of hiring another commercial vehicle may be shown as an element of loss in this connection. *Ibid.*

The need for reasonable certainty in such proof is illustrated in the following holding:

"These damages include not only the cost of repairs, but also a sum allowed for deprivation of the use of the automobile during the time required for these repairs. It appears that the automobile was used in the plaintiff's business, but it does not appear in what manner it was used nor what profits were derived from its use. It further appears that while the automobile was in the repair shop the plaintiff hired no other automobile, but used a second automobile belonging to himself. I do not think that, under these circumstances, any damages for the deprivation of the use of the automobile can be allowed. A judgment for damages must be based upon definite proof, and not upon conjecture. Where an automobile has been injured, the court can award damages for the deprivation of its use while it was in the repair shop only where it is shown that the automobile was used for a business purpose, or that another vehicle was hired to take its place. There is no claim here that any other vehicle was hired to take its place, and the judgment, therefore, must stand or fall upon the proof that it was used in the plaintiff's business. If damages are awarded because the plaintiff was deprived of the use of the automobile in his business, these damages must, of course, be based upon an estimate of loss to his business. There is, however, in this case no claim that the business has suffered any loss; in fact, it affirmatively appears that the plaintiff suffered no loss in his business, for he had another automobile which he could use in place of the injured automobile."

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CONTRACT, UNLAWFUL INTERFERENCE WITH

Q—You are the plaintiff in this action?

Q—In what business are you engaged? A—In the lumber business.

Q—Were you engaged in this business on the 8th day of December, 1944, and for some time prior thereto? A—I was.

Q—Did you, on or about that date, have any conversations with a Mr. John Baler with respect to the sale of lumber? A—I did.

(Ordinarily conversations with a third party are not binding on the defendant, and hence inadmissible, but in the instant case they make out one of the essentials of the action.)

Q—Do you recall the exact date of these conversations?

Q—Will you please tell this court and jury the substance of these conversations. A—Mr. Baler asked the price of certain lumber, shoring planks, and how soon I could make delivery, etc.

(The plaintiff should show in detail that his relationship with the third party was such that a contract would have resulted had not the defendant interfered.)

Q—Was there any paper or other writing signed by you or the defendant at that time? A—Yes, this memoranda of sale.

(Offered in evidence as plaintiff's exhibit.)

Q—Did you thereafter complete the contract?

Q—Will you please tell this court and jury the nature of any conversations you had with this party after December 8th, 1944?

(The proof should make clear, through disinterested witnesses, the precise character of the representations or acts by the defendant alleged to constitute an unlawful interference.)

The courts are not in complete accord on the question whether a person who suffers loss of a contract which he might have completed if a third party had not interfered to cause such loss, may recover damages against such third party. According to some authorities, no actionable wrong is committed where one persuades another to refrain from entering into a contractual relationship with a third party. See cases collected in 99 ALR 12.

The more recent trend of decisions is to recognize a cause

of action for interference with a contemplated contractual relationship. *Union Car Adv. Co. v. Collier*, 263 NY 386, 189 NE 463.

"If a tradesman or merchant is deprived of the business of others through one's wrongful conduct, he has a cause of action for the loss thus sustained, albeit there was no contractual relationship between him and the prospective patrons. Unjustifiable interference with one's right to pursue his lawful business or occupation, and to reap the earnings of his industry, is forbidden. The law enjoins the employment of practices that are outside of the domain of fair trade competition. The means made use of must be devoid of the taint of fraud, intimidation, obstruction, and molestation." *Kamm v. Flink*, 113 NJL 582, 175 Atl 62, 99 ALR 1.

Thus, it has been held an actionable wrong to maliciously interfere with the consummation of a real estate sale, where such sale would have been consummated were it not for the interference. *Krigbaum v. Sbarbare*, 23 Cal App 427.

"Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing." *Walker v. Cronin*, 107 Mass 555.

"The right to pursue a lawful business is a property right that the law protects against unjustifiable interference. Any act or omission which unjustifiably disturbs or impedes the enjoyment of such right constitutes its wrongful invasion, and is properly treated as tortious." *Kamm v. Flink*, 113 NJL 582, 175 Atl 62, 99 ALR 1.

It is, of course, essential to show that the contract which is alleged to have been lost as a result of the interference by the defendant, would have been completed and made fully binding, but for such interference. *Debnam v. Simonson*, 124 Md 354, 92 A 782.

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Thus, it has been stated that the "mere fact that the plaintiff has suffered damage or has lost an opportunity to profit financially because of his failure to consummate his plans owing to the purchase of said lot of land by the defendants does not in itself give him the right of recovery from the defendants for the damages sustained by him. The act must be of such a character as to create an actionable wrong before the right of recovery against the defendant exists, and to create an actionable wrong, the legal rights of the plaintiff must be in some way invaded. . . . It cannot be said that the act of the defendant is unlawful in the sense that he has invaded the rights of the plaintiff, merely because the plaintiff contemplated the purchase of said land and had disclosed this fact to him, and had employed him for the purpose stated, when it is not disclosed . . . that he had entered into negotiations with the owner for the purchase of said lot or had done anything looking to the acquisition of any rights in respect thereto." *Ibid.*

The precise line at which proper competitive practice changes to malicious interference obviously depends upon the facts and circumstances of each case. It may be noted, however, that the law prescribes no precise type or character of conduct which may fall within the ban; it may be any type of persuasion.

In one case, it was stated that while "a trader may lawfully engage in the sharpest competition with those in a like business, by offering extraordinary inducements, or by representing his own goods to be better and cheaper than those of his competitors, yet when he oversteps that line and commits an act with the malicious intent of inflicting injury upon his rival's business, his conduct is illegal, and if damage ensues from it the injured party is entitled to redress." *Kamm v. Flink*, 113 NJL 582, 175 Atl 62, 99 ALR 1.

The damages recoverable in actions of the character under discussion depend upon the facts and circumstances of the particular case. In one case it was held that the measure of damages resulting from the action of a lessor in interfering with a sale of the lease by the lessee is the difference, with interest, between the contract price and the actual or market value of the property at the time the sale was prevented. *Bailey v. Hans Watts Realty Co.* 113 W Va 739, 169 SE 404.

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CONTRACT WITH INCOMPETENT PERSON, ENFORCEMENT

- Q—You are the plaintiff in this action?
- Q—In what business are you engaged? A—I operate an agency for the sale of new cars.
- Q—Did you, on or about the 9th day of June 1941, have any conversations with the defendant in this case respecting sale of an automobile? A—I did.
- Q—Do you recall the exact date? A—June 9th, 1941.
- Q—Where were these conversations had?
- Q—Describe the nature of the conversations you had with the defendant.
(Show in detail the character of any agreement entered into with the incompetent.)
- Q—Was the defendant alone at that time?
- Q—Was there any writing or memoranda entered into at that time based upon these conversations? A—Yes.
- Q—I show you a memoranda, dated June 9th, 1941, and ask if that is the writing you refer to? A—Yes, it is.
- Q—Is that your signature upon this memoranda?
- Q—Did you see the defendant sign the paper?
- Q—Is that the signature you saw him affix to the paper?
(Offered in evidence as plaintiff's exhibit.)
- Q—What representations, if any, did you make to the defendant immediately preceding his signing of this paper?
- Q—Did you notice anything unusual in the behaviour of the defendant? A—No.
- Q—Was that the first time you saw the defendant?
- Q—Was anyone else present at that time?
- Q—Do you know of your own knowledge whether the car described in this memoranda was actually delivered to the defendant?
- Q—On what date?
- Q—Did the defendant make any payment on this account?

The weight of authority is to the effect that where there has been no formal adjudication of insanity, a contract made upon an adequate consideration with an incompetent, where

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the incompetent person has had the full benefits thereof, and the other party has acted in good faith, without fraud or undue influence and without knowledge of the insanity, will be upheld by the Court. *Neale v. Sterling*, 117 Cal App 507, 4 P(2d) 250; *Farrior v. Hughes-Law Lumber Co.* 113 Fla 209, 151 So 377; *Begley v. Holliday*, 248 Ky 453, 58 SW(2d) 654; *Anderson v. Nelson*, 248 Mich 160, 226 NW 830; *Pichel v. Fair Stores Co.* 29 Ohio App 322, 163 NE 511; *Dowlin v. Boyd*, 284 SW 636 (Tex Civ App).

"Although the contract of an insane person prior to adjudication of his insanity sometimes may be avoided, yet, when there has been adequate consideration and full performance by the other party in good faith, with resulting advantage to the lunatic, and restoration of the status quo is impossible, liability of the lunatic may be found." *Hargraves v. Thornton*, 49 RI 302, 142 Atl 371.

Where it is sought to avoid the contract, the incompetent person must, as a condition precedent, place the other party in his original position. *Neale v. Sterling*, 117 Cal App 507, 4 P(2d) 250; *Farrior v. Hughes-Law Lumber Co.* 113 Fla 209, 151 So 377; *Begley v. Holliday*, 248 Ky 453, 58 SW(2d) 654; *Anderson v. Nelson*, 248 Mich 160, 226 NW 830; *Pichel v. Fair Stores Co.* 29 Ohio App 322, 163 NE 511; *Dowlin v. Boyd*, 284 SW 636 (Tex Civ App).

"It is a condition precedent, for a mentally incompetent to relieve himself from a contract made during his incapacity, to restore the benefits received by him if such benefits are still in his possession or control. In other words, he must place the grantee, in all respects, as far as possible, in statu quo. The incompetent is relieved of the necessity to make restitution or tender where he shows that such restitution or tender is impossible. Where no benefit has been received, the parties are already in statu quo." *Fields v. Union Central Life Ins. Co.* 170 Ga 239, 152 SE 237.

It should be further noted that the rule that a bona fide contract of an incompetent is voidable where the parties can be placed in their original possession, is subject to the exception that where the incompetent has not received the benefit of the consideration, a contract will be set aside without a return of the consideration, notwithstanding that it was made in good faith, and before any formal adjudication of incompetency. *Engelbercht v. Davison*, 204 Iowa 1394, 213 NW 225.

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"After an adjudication, a purported agreement, by an insane person is not voidable, but is void, and the judgment as to incompetency should doubtless be taken as notice of that fact." *Atlanta Bkg. & Sav. Co. v. Johnson*, 179 Ga 313, 175 SE 904, 95 ALR 1436.

CONVICTION OR ACQUITTAL, PROOF OF

The weight of authority supports the view that a judgment of conviction or acquittal rendered in a criminal prosecution cannot be shown as evidence in a purely civil action, for the purpose of establishing the truth of the facts upon which it was rendered. *Washington Nat. Ins. Co. v. Clement*, 192 Ark 371, 91 SW(2d) 265; *Burbank v. McIntyre*, 135 Cal App 482, 27 P(2d) 400; *Krowka v. Colt Patent Fire Arm Mfg. Co.* 125 Conn 705, 8 Atl(2d) 5; *Re Johnston*, 220 Iowa 328, 261 NW 908 (affirmed on rehearing in 220 Iowa 337, 262 NW 488); *General Exch. Ins. Corp. v. Sherby*, 165 Md 1, 165 Atl 809; *Silva v. Silva*, 297 Mass 217, 7 NE(2d) 601; *True v. Citizens' Fund Mut. F. Ins. Co.* 187 Minn 636, 246 NW 474; *Young v. Davis*, 174 Miss 435, 164 So 586; *Hampton v. Westover*, 137 Neb 695, 291 NW 93; *Kelly v. Simoutis*, 4 A(2d) 868 (NH); *Warren v. Pilot L. Ins. Co.* 215 NC 402, 2 SE(2d) 17; *Abrahams v. Beaman*, 26 Ohio NPNS 245, 5 Ohio L Abs 77; *Goodwin v. Continental Casualty Co.* 175 Okla 469, 53 P(2d) 241; *Teslovich v. Fireman's Fund Ins. Co.* 110 Pa Super Ct 245, 168 Atl 354. Annotation: 130 ALR 690.

Upon the question of allowing the record of an acquittal to be shown in a civil action as proof of the facts upon which it is based, the courts seem more in accord in denying the propriety of such practice. *Occidental Ins. Co. v. Chasteen*, 255 Ky 710, 75 SW(2d) 363.

Thus, it is held that evidence of acquittal of one seeking recovery under a fire insurance policy, of a criminal charge of setting fire to the property involved, is inadmissible. *Ibid.*

A few decisions support the view that the record of an acquittal may be used in a civil action as some evidence of the facts upon which it is based. *Fidelity-Phenix F. Ins. Co. v. Murphy*, 226 Ala 226, 146 So 387; *Sovereign Camp, W. W. v. Gunn*, 227 Ala 400, 150 So 491 (later appeal in 229 Ala 508, 158 So 192); *Fidelity-Phenix F. Ins. Co. v. Murphy*, 231 Ala 680, 166 So 604 (writ of certiorari denied in 299 US 557, 81 L ed 410, 57 S Ct 19); *North River Ins. Co. v. Militello*, 100 Colo 343, 67 P(2d) 625 (later appeal in 104 Colo 28, 88 P(2d) 567); *Hardeman v. Georgia Power Co.* 42 Ga App 435, 156 SE 642; *Douglas v. Central of Georgia R. Co.* 48 Ga App 427, 172 SE 828; *Re Rechtschaffen*, 278 NY 336, 16 NE(2d) 357;

Everdyke v. Esley, 258 App Div 843, 15 NYS(2d) 666; Romano v. Romano, 34 Pa D & C 215. But compare the Pennsylvania cases set out under "Majority rule;" Poston v. Home Ins. Co. 191 SC 314, 4 SE(2d) 261, 123 ALR 1451. Annotation: 130 ALR 695.

A few of the decisions are explicit in stating that the record of conviction constitutes prima facie evidence of the facts upon which it is based. North River Ins. Co. v. Militello, 100 Colo 343, 67 P(2d) 625; Sovereign Camp v. Gunn, 227 Ala 400, 150 So 491.

In some instances the record of conviction based upon a plea of guilty has been held admissible in a civil action, notwithstanding the convicted person was not the defendant in the civil proceeding. Boyle v. Bornholtz, 224 Iowa 90, 275 NW 479, where it was held that while a plea of guilty, made by one who was the deceased's cohort in an alleged assault upon the defendant, to a criminal charge of assault with a deadly weapon upon the defendant with a specific intent to rob, was not conclusive as to such facts, it was admissible in evidence as an admission.

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**COPYRIGHT OR LITERARY PROPERTY,
INFRINGEMENT OF**

(Action on common-law copyright)

Q—You are the plaintiff in this action?

Q—Did you, during the year 1940, conceive a plan for a system of shorthand?

Q—Please describe this plan or system as simply as possible.

Q—Do you recall when you first conceived of this system?

Q—In whose employ were you at that time?

Q—Did you reduce this system to writing?

Q—And how long did you require to reduce this plan to writing?

Q—At approximately what date did you write out your ideas?

Q—Who assisted you in writing them out?

Q—I show you a manuscript and ask if this is the plan you wrote out, and which you have just described? A—Yes, it is.

(Offered in evidence as plaintiff's exhibit 1)

Q—Who assisted you in writing out this manuscript?

Q—Did you consult anyone in compiling the plan?

Q—Please describe in detail what you did with the manuscript after you completed the same.

(To whom did plaintiff show the manuscript; to what extent did he circulate the same; how widely circulated was the same, etc.?)

Q—Where did you place the manuscript after you completed the same?

Q—Were any copies made?

Q—To whom did you exhibit these copies?

Q—And where were the copies distributed?

Q—Did you exhibit the original manuscript to the defendant in this action?

Q—Under what circumstances was this exhibition made?

Q—And at whose request?

Q—What conversations took place between you and the defendant at that time?

Q—Did you, during such conversation, give permission to the defendant to use any portion of your manuscript?

Q—For how long a period did the defendant retain the manuscript?

Q—Did you copyright your manuscript at any time?

Q—At what date did you register your work for copyright?
(The plaintiff should be fully prepared to show the extent of "lifting" or "copying" on the part of the defendant. Mere use of the idea contained in the manuscript is not sufficient to sustain the cause of action.)

The Copyright Act provides that procedure in actions for infringement of copyright must be governed by rules prescribed by the United States Supreme Court. Thus, an action under the copyright statutes may not be maintained unless the provisions of the Act relative to depositing of copies and registration of the work have been complied with; the Act does not, however, bar recovery for an infringement prior to the deposit of the copies, where the deposit, although delayed, is made before the institution of the action. *Washingtonian Pub. Co. v. Pearson*, 306 US 30, 83 L ed 470.

Seizures under the Copyright Act are also subject to the Rules of the Supreme Court, where it is provided that the complainant must make an affidavit which sets forth the existence and location of the physical devices used in the plagiarism, such as molds, matrices, as well as the infringing articles. Thereupon, on the filing of a bond in a sum specified by the court not exceeding twice the reasonable value of the property to be seized, a writ issues to the marshal ordering him to seize the articles described in the affidavit and retain them in his custody, pending an order of the court relative to their disposal. The defendant may thereafter petition the court for a return of the articles in the manner prescribed in the rules. (Rules 1, 10, 11.)

The Rules of the Supreme Court also provide generally that a copy of the alleged infringement, and a copy of the work alleged to be infringed, should accompany the petition or its absence be satisfactorily explained.

Exceptions to this rule are indicated in the case of alleged infringement of a dramatic or musical composition, lectures, sermons or addresses, and any other instance where it is not

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feasible or practical to affix a copy of the matter allegedly pirated. Rule 2 of Rules of United States Supreme Court.

The common law right to recover damages for infringement of literary property is preserved in those cases where there has been no copyright registration, or publication, of the property involved. Where there has been a registration of the subject matter, suit must be instituted in the Federal courts.

The action may be instituted in the district of which the defendant, or his agent, is an inhabitant or in which he may be found. (17 USCA § 35.) It should be noted, however, that this provision does not authorize institution of suit against a corporation in a district of which it is not an inhabitant, or in which it is not doing business, merely by serving process upon an officer while he is temporarily in the district on private business. (*Lumiere v. Wilder*, 261 US 174, 67 L ed 596.)

Where the issues are involved, or will involve protracted hearings, the court may order a master to take the evidence and file his report.

Damages for infringement of a copyright are provided for in 17 USCA § 25(b), which specifies that the infringer is liable to pay to the owner of the copyright such damages as may actually have been suffered, together with all profits made by the offending party, or in lieu thereof, such damages as the court may deem just. Costs may also be allowed to the prevailing party, as well as reasonable counsel fees.

In proving profits, the plaintiff is required only to prove sales, while the defendant is required to prove every element of damage which he claims. Expert testimony is frequently employed as an aid in apportioning profits in cases where the copyrighted material is not the source of all the profits of the infringer. *Sheldon v. Metro-Goldwyn*, 309 US 390, 84 L ed 825.

It is essential for the plaintiff, in an action for infringement of a literary property or any other writing or work, to draw a sharp line of demarcation between rights in ideas and rights in the physical property itself. No common-law or statutory remedy exists for theft or misuse of an abstract idea, as distinguished from its physical concept. Unless some part of the idea itself is physically transplanted or misused by the defendant, no cause of action inheres.

"There may be literary property in a particular combination of ideas or in the form in which ideas are embodied. There can be none in ideas. Ideas, it has always been admitted even by the Stationer's Company, are free as air. If you happen to have any, you fling them into the common stock and ought to be well content to see your poorer brethren thrive upon them." *Fendler v. Morosco*, 253 NY 281.

Thus, the creators of the following plans, schemes and ideas have been held not to possess an exclusive right to the use thereof: an idea for a manual of instruction for sales dealers, an original scheme for distribution and layout of playing cards, an idea for a tariff rate book with a novel arrangement of matter, an original idea to increase the volume of newspaper advertising, a scheme or plan for aiding salesmen in closing their sales, a novel plan for a sales catalogue, the idea for "Bank Night" in theatres, or an idea for an original system of shorthand. *Stone v. Dugan*, 210 Fed 399, affirmed 220 Fed 837; *Russel v. Northeastern Publishing Co.* 7 F Supp 571; *Guthrie v. Curlett*, 36 F(2d) 694; *Taylor v. Commissioner of Internal Revenue*, 51 F(2d) 915; *Soule v. Bon Ami Co.* 201 App Div 794, 195 NY Supp 574; *Caeser & Blair v. Merchants Assn.* 64 F(2d) 575; *Affiliated Enterprises v. Gruber*, 86 F(2d) 958; *Griggs v. Perrin*, 49 Fed 15.

"At common law as well as under the copyright acts, it is the form, sequence and manner in which the composition expresses the idea which is secured to the author, not the idea." *Moore v. Ford*, 28 F(2d) 529.

Similarly, in *Maxwell v. Goodevin*, 93 Fed 665, the court stated: "There is no inherent property right in ideas, sentiments, or creations of the imagination expressed by an author, apart either from the manuscript in which they are contained, or the concrete form which he has given them, and the language in which he has clothed them."

The fact that the idea has been reduced to precise and exact physical form will not vary the rule set forth in the preceding paragraph. Thus, the Culbertson system of bridge was set forth in a copyrighted book, and the idea later used by another. The court held:

"Neither the Culbertson system nor Downes method of teaching, nor his arrangement of material is a subject of prop-

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erty rights. Each may be freely used and copied." *Downes v. Culbertson*, 153 Misc 14, 275 NY Supp 233.

An action for theft of an idea is well grounded when it is shown that infringement or misuse of the original concept is accompanied by theft of words, or a substantial reproduction thereof. Courts will seize upon evidence of "lifting," or a literal reproduction of wording, to justify recovery for taking of an idea, notwithstanding that the latter, standing alone, affords no basis for legal action. *Jenkins v. News Syndicate Co.* 128 Misc 284, 219 NY Supp 196.

The theory is sometimes advanced by defendants in actions for infringement of a common law copyright that the law creates an implied agreement to refrain from the unauthorized use of an idea exhibited to one person by another. The promise to preserve a confidence shared is alleged to be inherent in the very nature of the relationship. But the courts have overruled this argument, and made an express contract the sole basis upon exclusivity in such cases may be protected.

Lueddecke v. Chevrolet Motor Co. 70 F(2d) 345, where the court stated: "When plaintiff voluntarily divulged his mere idea and suggestion, whatever interest he had in it became common property, and, as such, was available to the defendants." To same effect see *Bristol v. Equitable Life Assurance Society*, 132 NY 264.

A common element of proof in infringement cases is the coincidence of errors. It is clear that where the creator of an original work inserts mistakes in spelling, computation, description, or proper names, that a copying of such errors in the work of another furnishes cogent proof of "lifting" or copying. However, it is clear that the burden of proof of infringement remains on the plaintiff throughout; the adducing of proof of similarity in errors may shift the burden of explanation to the defendant, but not the initial burden of proof. *Callaghan v. Myers*, 128 US 617, 32 L ed 547, holding also that where the proof shows the "lifting" of a considerable portion of the plaintiff's work, through copying of errors and mistakes, other passages may be presumed to have been copied, notwithstanding that no errors appear in common.

All errors in common should be clearly marked out and indicated on the proof and exhibits to be used at the trial. Such

similarity in errors should be read to the jury after the exhibit has been placed in evidence, and it may be good trial tactics to have the witness mark sufficient copies of the exhibits to provide six copies for the jury, so that each two jurors may follow the testimony and better appreciate the significance thereof.

The plaintiff must, of course, be fully prepared to show the originality or novelty of the matter forming the subject of the action. Unless the property he sues upon is original with him, he may not sue for the illegal use of the same by another. Where the plaintiff is confronted with the issue of lack of originality, it is important that he be prepared with adequate proof to disprove the contentions offered by the defendant.

A comprehensive search should be undertaken to show that matter apparently similar to the material created by the plaintiff is in fact dissimilar. Apparent differences should be explained. All possible sources should be checked for matter that may be relied upon by the defendant in this connection; for it is clear that unless the property and ideas embodied therein which the plaintiff claims he originated, are actually original with him, he may not sue for infringement or theft thereof. *Soule v. Bon Ami Co.* 201 App Div 794, 195 NY Supp 574, where the court stated that: "No person can by contract monopolize an idea that is common and general to the whole world."

In preparing the case for trial, counsel for the plaintiff should be fully aware of the necessity for concrete evidence of infringement. Mere suspicion or inference is too often relied upon as a basis for such actions. Exhibits should be clearly marked, with all points of similarity indicated. Whenever possible, sufficient copies should be secured for distribution to the jury, court and opposing counsel. If the matter involved is technical, as for example an engineering project, expert testimony should be readied for a clarification of points of similarity.

CORRESPONDENCE AS CREATING CONTRACT

The general rule is stated by the courts that the question whether correspondence constitutes a contract is a question for the court to decide. *Brewer v. Fair*, 36 Ga App 195, 136 SE 110; *Moody v. Standard Wheel Co.* 20 Ind App 422, 50 NE 890; *National Produce Co. v. Dye Yaus Co.* 199 Iowa 286, 201 NW 572.

Thus it has been stated that where the only evidence as to the existence of a contract is to be found in written correspondence between the parties to the action, and there is no conflict as to the nature or contents of this correspondence, that it is for the judge to determine from his own interpretation of the correspondence whether the minds of the parties met to such an extent as to create a legal binding contract. *Gettys v. Marsh*, 145 Ill App 291.

"The plaintiff argues that the letter of October 19th, 1918, in which the defendant said it would not pay over \$28 per ton for mixed paper stock of a quality specified, was, in effect, in the light of previous correspondence, an offer to purchase, which upon its acceptance by the plaintiff constituted a contract. The question whether a contract was so made was one of law for the court, as there was no ambiguity and as nothing appears in the letters permitting a factual inference." *De Vito v. Boehme & R. Co.* 239 Mass 290, 132 NE 35:

The court stated in one instance:

"When it appears to the satisfaction of the court that an offer and an unconditional acceptance has been made by letters and telegrams alone, the authenticity of which is not denied, the parties are bound by the contract resulting therefrom. When the telegram relied on to constitute the offer in such a contract contains language indicating that a future formal contract is contemplated, and no independent facts and circumstances are involved, the meaning of that clause is for the court, and not for the jury, to determine." *Universal Products Co. v. Emerson*, 179 Atl 387 (Del).

This rule has been stated to be applicable to a formal contract as well as commercial correspondence. *Scanlan v. Hodges*, 52 F 354.

In other instances it has been pointed out that where the meaning of specific correspondence, including trade and technical terms is conceded by both parties, that it is for the court

alone to say whether the parties have agreed upon a contract. *Lubell v. Rome*, 243 Mass 13, 136 NE 607.

This rule has been applied with respect to a determination of a question whether specific correspondence constitutes mere negotiations to sell on a valid offer and an acceptance of same. *Godfrey v. Central State Bank*, 5 SW(2d) 529 (Tex Civ App).

It should be noted however that where it is necessary to depend upon oral evidence to determine the meaning of certain language, that the question may then become one of fact for the jury to decide, in the light of the peculiar facts and circumstances of each case. *Brown v. American Gear Co.* 233 Mich 128, 206 NW 342; *Union Service Co. v. Moffett-West Drug Co.* 148 Mo App 327, 128 SW 7; *Watson v. Paschall*, 93 SC 537, 77 SE 291.

Thus it has been stated that in those cases where "a contract is to be gathered from a commercial correspondence which refers to material extraneous facts, or only shows part of a correspondence or dealing between the parties, it is sometimes necessary to leave the meaning and effects of the letters in connection with the other evidence to the jury." *Turner v. Yates*, 16 How 23, 14 L ed 829.

In those instances where the written correspondence does not, standing alone, constitute a contract, it would seem that evidence of the acts of the parties will not necessarily refer the issue of the existence of a contract to the jury unless under all circumstances such acts are conceded as supplying an element essential to the contract. *Benton Grain Co. v. Reger*, 131 Kan 735, 293 Pac 955; *Ellis v. Block*, 187 Mass 408, 73 NE 475; *Patrick v. Smith*, 90 Tex 267, 38 SW 17; *New England Box Co. v. Tibbetts*, 94 Vt 285, 110 Atl 434.

In some instances the question arises whether an agreement was intended without a formal contract. The rule here has been stated as follows:

"The fact that parties negotiating a contract contemplated that a formal agreement should be prepared and signed is some evidence that they did not intend to bind themselves until the agreement was reduced to writing and signed. But, nevertheless, it is always a question of fact, depending upon the circumstances of the particular case, whether the parties had not completed their negotiations and concluded a con-

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tract definite and complete in all its terms, which they intended should be binding, and which, for greater certainty, or to answer some requirement of the law, they designed to have expressed in some formal agreement." *Wharton v. Stoutenburgh*, 35 NJ Eq 266.

COVENANT OF TITLE, BREACH OF

Q—You are the plaintiff in this action?

Q—Are you the owner of property 567 Wilson Avenue?

Q—On what date did you purchase this property?

Q—From whom did you purchase the property?

Q—Did you, at the time of purchase of this property, receive a deed to such property?

Q—I show you what purports to be a deed to certain property and ask if this is the deed you refer to?

(After proper identification the deed should be marked in evidence.)

Q—On what date did you take occupancy of the property?

Q—Will you please describe the character of this property.

A—It is a store and lot in the rear, etc.

Q—Did you occupy the store at the time you took possession of the property?

Q—What character of business did you conduct in this store?

Q—Now will you please tell us what use, if any, you made of the lot in the rear of the store? A—I used it to park my trucks, store goods, etc.

Q—What, if anything, happened thereafter with respect to your use of this lot?

(The grantee may show the existence of an outstanding easement to the use of the lot by a third person, or any other encumbrance upon his right to full use of the property.)

(The proof should make clear the nature and extent of the use made by the grantee of the property, in order to afford a full background for the damages recoverable.)

A covenant of seisin may be defined as an assurance to the covenantee that the party making the promise is lawfully seized of a specific interest or estate in the property involved, in most instances where no qualifying provision is included, such interest or estate is referable to an estate in fee simple.

A covenant of this character operates in the present, as distinguished from a covenant operating in the future, and is therefore breached immediately upon its execution, thereby giving rise at once to a cause of action for damages. *Funk v. Cresswell*, 5 Iowa 62; *Hilloker v. Rueger*, 228 NY 11, 126

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NE 266; *Pridgen v. Long*, 177 NC 189, 98 SE 451; *Beulah Coal Min. Co. v. Heihn*, 46 ND 646, 180 NW 787.

"It is well established by the great weight of authority that a covenant of seisin runs in the present in reference to the date of the deed, in contradistinction to a covenant of warranty, or for quiet enjoyment, which runs in the prospective, and that, in the event of its not being true when made, there is a breach of it eo instanti, as soon as the deed is made and delivered, and an immediate right of action accrues to the vendee for its breach, and the rights of the parties must be determined by the condition of the title at the date of the covenant." *Beulah Coal Min. Co. v. Heihn*, 46 ND 646, 180 NW 787.

Elsewhere it is stated that the "practical distinction between a covenant of warranty, and the covenant for seisin and against encumbrances, is stated to be this: that under the latter covenants, the purchase of an adverse claim has nothing to do with their breach. If the title be defective, or if an encumbrance exist, these covenants are broken as soon as made, and the purchaser's right of action is not affected by the purchase of the paramount claim; such a purchase merely affects the question of damages. It is sufficient to constitute a breach of the covenant of seisin, or against encumbrances, that such claim or encumbrances exist, whether asserted or not. But to constitute a breach of the covenant of warranty, it is necessary that the adverse claim be hostilely asserted. It is not necessary that it be asserted by judgment, or even by a suit. The distinction is not whether there has or has not been a judgment in favor of the paramount claim, but it is whether such claim has, or has not, been adversely asserted." *Hilloker v. Rueger*, 228 NY 11, 126 NE 266.

An actual eviction is not essential to recover damages for breach of a covenant of seisin. Annotation: 61 ALR 43.

Where the particular jurisdiction recognizes the basic difference between a covenant operating in the present, and one operating in the future, it is generally held that the breach of a covenant of seisin constitutes a failure of the consideration involved, in whole or part depending upon the circumstances of each case, so that the damages recoverable will include the amount of the consideration paid by the grantee. *Logan v. Moulder*, 1 Ark 313, 33 Am Dec 338; *Lloyd v. Sandusky*, 203 Ill 621, 68 NE 154; *Rockafellor v. Gray*, 194 Iowa

1280, 191 NW 107; *Murphy v. United States Title Guaranty Co.* 172 NY Supp 243, 104 Misc 607.

Under some circumstances, it has been held that nominal damages only may be recovered by the grantee. Thus, where the covenantee went into possession of the property, and abandoned same upon learning of the defective title, his damages have been limited to a nominal recovery. *Cockrell v. Proctor*, 65 Mo 41.

"The existence of a paramount title, whether asserted or not, is a breach of the covenants of seisin specifically expressed in the deed, as well as of that contained in the words 'grant, bargain and sell,' employed in conveying the land. Where, under the deed, the grantee takes possession of the premises conveyed, he can recover only nominal damages until he has been compelled by the assertion of the paramount title to yield the possession to the claimant. If the lands conveyed had been in the possession of a stranger holding at the date of the deed under a paramount title, as nothing would have passed to the grantee by the deed, the covenant would have been broken as soon as made, and substantial damages could have been recovered by the grantee." *Cockrell v. Proctor*, 65 Mo 41.

Similarly, it has been held that only nominal damages may be recovered where the grantee did not bring her action until after she accepted a quitclaim deed which vested a good title in her, without any proof of actual loss or damage as a result of the breach of the covenant of seisin. *Werner v. Wheeler*, 142 App Div 358, 127 NY Supp 158.

At the same time, however, a grantee may not be compelled to accept a paramount title from the grantor, where the latter did not originally have title to the land involved. *Resser v. Carney*, 52 Minn 397, 54 NW 89.

"The doctrine is well supported by authority that a grantee to whom no title passed by the deed of conveyance, who acquired no possession, and no right of possession, may recover the purchase money paid, with interest, in an action for a breach of the covenant of seisin, even though the grantor may have acquired a title during the pendency of such an action, or, perhaps, even prior to its commencement; that the grantee is not to be compelled to accept the after-acquired title in satisfaction of the already broken covenant of seisin, or in

mitigation of damages recoverable for the breach." *Resser v. Carney*, 52 Minn 397, 54 NW 89.

A covenant against encumbrances includes anything which in any manner burdens the estate conveyed, or which constitutes a charge against the property. Annotation: 61 ALR 61.

As aptly stated: "A covenant against encumbrances stands on an altogether different footing from a covenant of seisin or of good right to convey. On an encumbrance not extinguished the grantee can only recover nominal damages, but, if it has been extinguished, the sum recoverable is the full amount of the payment which the party has been compelled to make. The above rule is founded on this reason, that such covenant is considered as strictly a covenant of indemnity, and that the grantee ought not to recover the value of the encumbrance on a contingency, when he may never be disturbed by it. This is a reasonable rule, for if he were to recover the value, for example, of an outstanding mortgage, the mortgagee might still resort to the defendant, on his personal obligation, and compel him to pay it, and if the purchaser feels the inconvenience of the existing encumbrance and the hazard of waiting until he is evicted he may go and satisfy the mortgage, and then resort to his covenant." *Mitchell v. Hayden*, 4 Conn 495, 10 Am Dec 169.

The damages recoverable for breach of a covenant against encumbrances are generally such as will compensate for the losses or injury actually received. *Beecher v. Baldwin*, 55 Conn 419, 12 Atl 401.

The covenantee is entitled to recover the fair and reasonable expense of extinguishing the encumbrance. *Henderson v. Henderson*, 13 Mo 151.

But where such cost would exceed the expense of eviction, a contrary rule has been held applicable. *Gardner v. Niles*, 16 Me 279.

It has further been held in this connection that where the character of the encumbrance is such that, if not extinguished, it will take the whole estate, and the cost of extinguishing same is less than the value of the estate, so that the cost of such extinguishment would be a less burden to the covenantor than an eviction, such expense is the proper measure of damages for breach of the covenant against encumbrances. *Gardner v. Niles*, 16 Me 279.

It may further be noted in this respect that the law imposes no duty on the covenantee to discharge or remove a cloud or defect upon the title or his enjoyment of same; so that where the covenantee's title is divested by proceedings based upon the encumbrance, the damages thereby sustained are fully recoverable. *McGuckin v. Milbank*, 152 NY 297, 46 NE 490.

"A covenant against encumbrances is treated as a contract of indemnity, and although broken as soon as made, if broken at all, nevertheless a recovery (beyond nominal damages) is confined to the actual loss sustained by the covenantee by reason of the payment or enforcement of the encumbrance against the property. He is not permitted to recover the amount of the outstanding encumbrance before payment or loss of the property, although its existence may be an embarrassment to his title and subject him to inconvenience." *McGuckin v. Milbank*, 152 NY 297, 46 NE 490.

Where the encumbrance is in the nature of an easement, or other permanent obstruction to a clear title, the damages recoverable are such as fully and fairly compensate the covenantee for the damages sustained. *Hansen v. Pattberg*, 212 App Div 49, 206 NY Supp 866; *Smith v. White*, 71 W Va 639, 78 SE 378, 48 LRA(NS) 623.

"When the encumbrance has inflicted an actual injury upon the purchaser, the rule can only be generally stated to be that the damages are sought to be proportioned to the actual loss sustained. Thus, if the encumbrance be of a character which cannot be extinguished, such as an easement, or servitude, an existing lease, or the like, it is said that the damages are to be estimated by the jury according to the injury arising from its continuance. There is a good reason for the distinction. In case of an encumbrance by an ordinary lien or mortgage, the grantor may pay off the encumbrance at any time, and free the premises, or the person who made the lien or mortgage may extinguish them, and the grantee may never be injured. But an easement or servitude is unextinguishable by any act of the party, either grantor or grantee, and, if its continuance is permanent, the damages must be assessed accordingly." *Kellogg v. Malin*, 62 Mo 429.

It has been held in one case that the right conferred upon third persons to enter the premises and remove ice from a

body of water thereon, with a right of way over the premises, constituted an encumbrance, entitling the grantee to damages. *Smith v. Davis*, 44 Kan 362, 24 Pac 428.

"The defendant's interest in the property was diminished to the extent of the rights transferred by the lease. The encumbrance consisted of the right to cut, haul, and remove ice from the premises, and the right of way across the premises for the purpose of cutting, hauling, and removing ice therefrom. These things constituted an absolute, unqualified, and unconditional encumbrance upon the premises. In this respect they are unlike a contingent dower interest such as could exist at common law, which might never come into actual existence. Neither the plaintiff nor the defendants had any power to remove or to extinguish this encumbrance except with the consent of the lessee; and the value of this encumbrance, or the injury occasioned to the premises conveyed, no one could tell by any certain or definite rule. In this respect it is wholly different from a mortgage lien or any other kind of ascertainable money lien upon the real estate; for such a lien is fixed and definite in the amount which it would take to remove it. *Smith v. Davis*, 44 Kan 362, 24 Pac 428.

Similarly, an existing restriction upon the use of the land conveyed, by which only certain buildings could be erected thereon, has been held to constitute a breach of the covenant against encumbrances, entitling the grantee to substantial damages, measured by the impairment in market value of the property as a result of such restrictions. *Foster v. Foster*, 62 NH 46.

The court pointed out in this case that such restriction upon the use of the property constituted an "encumbrance upon the land in the nature of a negative easement, which the plaintiff cannot remove as a matter of right. Its existence constitutes a breach of the defendant's covenant against encumbrances. It is not a mere technical encumbrance, which does not interfere with the present enjoyment of the land, like a right of dower, which may never have any operative force by reason of depending upon a contingency that may never occur. The weight of it is as oppressive now as it ever can be. It is a present and continuing impairment of the free enjoyment of the land, and a legal obstruction to the exercise of that dominion over it, to which the plaintiff, as the lawful owner, is entitled. The restrictions may not interfere with

the use of the land for many purposes, but it is an absolute prohibition of its use for others, for which the plaintiff might otherwise lawfully use it. As the owner, he would have the right to use it for any lawful purpose; but, by reason of this encumbrance, its use in the prohibited mode would work a forfeiture of the entire title. The damages can be estimated as well now as at the end of twenty years. They may be inconsiderable, or merely nominal, and they may be substantial; but it is for the jury to determine. The evidence offered to show the difference in the market value of the land occasioned by the encumbrance was admissible." *Ibid*.

In those instances where the title is invalid as to a part of the land conveyed, resulting in loss of this portion of the property, the damages recoverable for such breach of warranty is the loss actually sustained following eviction therefrom. It is further pointed out that such damage is generally ascertained by measuring the average value, provided the recovery does not exceed the consideration paid, to which may be added the expenses of the suit and interest. *Martin v. Hamlet*, 159 Ga 465, 126 SE 371.

In all instances the burden of proof falls upon the covenantor or party that seeks to recover damages as the result of a defect in title. There is, for example, no presumption that the value of the portion of the property covered by the defect is equal to the value of the remaining property in the tract; the proportionate value must be proven. *Lane v. Stitt*, 143 Ark 27, 219 SE 340.

"The rule as to the measure of damages in case of a failure of the title to a part of the land conveyed, when determined by the consideration paid, is such fractional part of the whole consideration as the value, at the time of the purchase, of the part to which the title fails, bears to the whole, and interest thereon during the time the grantee has been deprived of the use of the part to which the title failed." *Merchants Nat. Bank v. Otero*, 24 NM 598, 175 Pac 781.

In another case it was pointed out that where the land conveyed is of the same value, with no difference in the quality or market worth of any proportionate part, the measure of damages is such proportion of the entire consideration paid as the quantity of the portion affected by the defective title bears to the whole land conveyed. *Conklin v. Hancock*, 67 Ohio St 455, 66 NE 518.

"It must be conceded that, where the land conveyed is all of the same quality, the measure of damages is such proportion of the consideration as the quantity of the land lost bears to the whole quantity conveyed; for it must be obvious that when a deed conveys a stated quantity of land which is uniform in quality or value, for a consideration expressed in gross amount, the actual loss upon a breach of the covenant of seisin as to a part would be a part of the consideration determinable by the proportion which the part of the land to which the title failed bears to the whole quantity conveyed. In such cases the covenantee recovers for the lost land exactly what he paid for it, with interest." *Conklin v. Hancock*, 67 Ohio St 455, 66 NE 518.

The parties to a transaction involving the transfer of real property may, by special agreement at the time of the transfer, stipulate as to the amount of damages recoverable, or the mode for determination of same.

Local statutes frequently govern in the determination of damages recoverable for breach of a covenant. Such statutes generally follow the broad concepts of the common law.

Burrows v. Peirce, 6 La Ann 297, the court pointing out that: "The rule of the common law conforms to the rules as to damages in all other cases. Damages are allowed for injuries flowing immediately and not consequently from the acts of the parties. The increasing value of property sold by a vendor does not flow from his acts, but from extraneous circumstances over which he has no control. If the vendee sells the property for an advanced price, which he loses when the title fails, it is a loss growing immediately out of his sale, and not that of his vendor. The loss growing out of the sale of his vendor is the price he paid, for which he is indemnified exactly by its restoration."

The costs and expenses to which a covenantee has been put in his defense of a suit involving a covenant in the title, may be recovered, where reasonable in amount. *Beach v. Nordman*, 90 Ark 59, 117 SW 785.

"A grantee in possession of land under a deed containing the usual covenants would, in surrendering possession to what he supposed to be a paramount title, act at his peril; and it is therefore generally held that, where he defends the action by the owner of the paramount title to recover possession of the land, he may recover from his covenantor the expenses

necessarily incurred, including a reasonable fee paid to his attorney." *Beach v. Nordman*, 90 Ark 59, 117 SW 785.

In *Matheny v. Stewart*, 108 Mo 73, 17 SW 1014, it was pointed out: "Defendant insists that plaintiff is not entitled to recover the costs of defending the title, for the reason that his immediate grantor notified him to make no defense. We do not regard this alone as a valid objection. Undoubtedly, one in possession of land under a deed of general warranty is justified in making every reasonable effort to retain the land, though the warrantor notified him to make no defense, and acknowledge his liability on his covenants. To relieve a warrantor of this damage by a simple notice not to defend would impose the expense of defending doubtful titles on the covenantee in all cases in which it was to his interest to retain the land, rather than accept the price he paid for it and 6 per cent interest thereon. When, however, it is perfectly apparent that the defense of the title would be useless, he should not incur the expense when notified by his grantor not to do so. The warrantor would fix his own liability when he gave the notice, and should have the right to avoid payment of unnecessary costs."

The rule is stated elsewhere that a person in possession yields to what he supposes to be a paramount title at his peril. And, holding a covenant from his grantor that he will warrant and defend the title, it would seem, under the law, that the covenantee may defend for him, and in fact, in some cases, must defend for him; and when he, in good faith, has done so, the taxable costs and attorneys' fees paid in such defense may be reasonably considered as a portion of the money paid for the title. It is paid to maintain what the grantor has affirmed by his covenant to be a perfect title. And as the law allows plaintiffs to recover these charges, it is upon the principle that it is a portion of the purchase money. Plaintiffs were, therefore, entitled to recover for taxable costs and reasonable attorneys' fees, paid in defending the ejectment suit by which they were evicted." *Harding v. Larkin*, 41 Ill 413.

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DEFAMATION OF GROUP, ACTION BY INDIVIDUAL

The rule is generally stated that where a libel or slander is uttered with respect to a general class of persons as distinguished from an individual that a member of this class may not maintain a cause of action for libel or slander against the person uttering the same. This rule has been applied to many broad classes of persons. Thus it has been held that a member of a public group or board may not maintain an action of libel because of defamatory remarks against members of the broad class of officers. *Lewis v. Soule*, 3 Mich 514; see also cases collected in 97 ALR 231.

Similarly it has been pointed out that the owner of an apartment house who resided therein, has no cause of action against one who called attention of the police to the questionable character of the house. In another instant it has been said that a defamatory statement directed to the French-Canadian race is too general to afford a cause of action against any individual member thereof. *Hyatt v. Lindner*, 133 La 614, 63 So 241, 48 LRA(NS) 256; *Germain v. Ryan*, 53 CS(Quebec) 543.

The same rule has been applied to an attack upon Catholic Clergymen. *People v. Eastman*, 188 NY 478, 81 NE 459, 11 Ann Cas 302.

This rule has been well stated as follows: "As the size of the group increases, it becomes more and more difficult for the plaintiff to show he was the one at whom the article was directed, and presently it becomes impossible. As a result of that, there are men who make their living by circulating falsehoods against the Jews, the Mormons, the Catholics, the Masons, etc., taking care to mention no names, and to make only general charges against all, and thus are able to ply their nefarious trade in safety because the group is so large that no particular individual can show the article is directed at him." *Louisville Times v. Stivers*, 252 Ky 843, 68 SW(2d) 411.

At the same time where a defamatory statement is used toward an entire group, including every member of this group, the statement may be held to refer to each member of the group. Thus, where the statement is made "Your children are thieves," it has been held that this statement is actionable as to any one of the children. Similarly it has been held that

the statement "Your sons stole my corn" is sufficient to sustain action by any one of the sons. *Gidney v. Blake*, 11 Johns. (NY) 54; *Maybee v. Fisk*, 42 Barb(NY) 326.

This rule is well stated in the following holding—"One who who publishes matter about a family in its collective capacity assumes the risk of its being libelous as to any member thereof. Any other rule would violate elementary principles of jurisprudence, in suffering a wrong to exist without a remedy, and would permit indiscriminating reference to the deeds of a single member of the family as the deeds of all collectively, while the odium should rest legally and morally only upon the member of the family who is guilty." *Fenstermaker v. Tribune Pub. Co.* 13 Utah 532, 45 Pac 1097.

**DIMINISHING COMPENSATION FOR PERSONAL INJURIES
OR DEATH BY PROOF OF PAYMENTS
FROM OTHER SOURCES**

The rule is well settled that a plaintiff in a personal injury action may not have his recovery diminished by proof that he received payment of part or all of his losses through other sources, as insurance, salary, etc. *Wachtel v. Leonard*, 45 Ga App 14, 163 SE 512; *Rusk v. Jeffries*, 110 NJL 307, 164 A 313; *Campbell v. Sutliff*, 193 Wis 370, 214 NW 374; see also cases cited in 95 ALR 575.

The theory behind this holding is illustrated in the following judicial expressions: "The general rule is that the admission of evidence that the plaintiff, in a personal injury action, has been compensated in whole or in part by the receipt of beneficial insurance, is prejudicial error. The reason for the rule is that a wrongdoer must compensate the injured party for the injury he has committed, without any reference to other compensation. In other words, if the defendant is liable in damages, the extent of his liability is not to be measured by deducting financial benefits received by plaintiff from collateral sources." *Owen v. Dixon*, 175 SE 41 (Va).

"The authorities, both numerically and in weight, agree that a defendant owes to the injured compensation for injuries the proximate cause of which was his own negligence, and that their payment by third parties cannot relieve him of this obligation, and that whether the motive impelling their payment be affection, philanthropy, or contract, the injured is the beneficiary of their bounty and not he who caused the injury." *Roth v. Chatlos*, 97 Conn 282, 116 Atl 332, 22 ALR 1554.

"In actions for negligence causing personal injury, the damages are not subject to deduction because of money paid to the plaintiff by an insurance company, under a policy of insurance against accident, as compensation for the same injury. The reason for the rule appears to be that the fact that the plaintiff has provided against accident and is entitled to certain benefits from an insurance policy in the event of accident or sickness occurring does not diminish the wrong done him by the accident, nor the liability of the wrongdoer to pay for such wrong." See 95 ALR 577.

"It makes no difference from what source the money came

which she used to pay these bills; whether it came from her father-in-law, who is defending here, or from any other source. As regards the father-in-law, if he made advances to her, very obviously they were not payments made on account of any liability which he had incurred arising out of this accident; so that, in the proper adjustment of the situation, whether or not he advanced money to her is of no consequence." *Dickerson v. Connecticut Co.* 98 Conn 87, 118 Atl 518.

"Where a city ordinance provides that if a member of the police department of the city is wholly disabled from active duty because of injury received by him in line of duty, he shall, during the period of disability draw his salary from the city, and that such payment of salary 'shall be construed as an increase in compensation' of the member of the police department, the money so paid to the injured policeman is equivalent to money paid under a policy of accident insurance, and the person whose tortious act caused the injury is not by reason of such payment relieved of liability for earnings lost by the injured person as a result of the injury." *Wachtel v. Leonard*, 45 Ga App 14, 163 SE 512.

DIRECTING VERDICT ON INTERESTED TESTIMONY

It is well settled that the testimony of a party, or an interested witness, does not conclusively or finally establish the fact to which the testimony is addressed, although there is no evidence directly contradictory thereto, since the credibility of the testimony of such a witness presents a question of fact for the jury to determine. This is the general, oft quoted rule; but exceptions and limitations have been woven into the statement of this rule, and modifications engrafted thereupon. *White v. McGehee*, 165 Ark 614, 261 SW 636; *Marks v. New Orleans Cold Storage Co.* 107 La 172, 31 So 671; *Edelen v. First Nat. Bank*, 139 Md 413, 115 Atl 599; *Boudeman v. Arnold*, 200 Mich 162; *Electric Fireproofing Co. v. Smith*, 113 App Div 615, 99 NY Supp 37; *Chicago, etc. R. Co. v. Hammond*, 286 SW 483, (Tex Civ App).

As stated: "The functions of judge and jury are too well understood to require extended discussion. The jury finds the facts; the judge decides the law. The jury weighs the evidence; the judge determines the legal questions. The credibility, sufficiency, and weight of the evidence on a given subject are for the jury; the question of whether there is any evidence on a given subject is for the court. Where the testimony is all one way, is uncontradicted by any testimony given in the case, either from a party's own witnesses or the other party's witnesses, either on direct, or drawn out on cross-examination, or by any facts or circumstances in the case, is not in itself in any way improbable or discredited, and but one legitimate inference may be drawn from it, and a case is thereby made for the plaintiff, or a defense made for the defendant, the duty rests upon the court to direct a verdict." *Boudeman v. Arnold*, 200 Mich 162, 8 ALR 789, 166 NW 985.

"The rule is general, if not universal, that where the witness is interested in the matter in controversy, and although his testimony is uncontradicted, his credibility is a question for the jury, and the court is not warranted in directing a verdict upon his testimony alone, when the testimony may be improbable in itself, or inconsistent with other things or other circumstances of the case." *Kennedy v. McAllaster*, 31 App Div 453, 52 NY Supp 714.

As a practical matter, the rule is not applied except where

the testimony of the interested witness, while not directly contradicted, was nevertheless inconsistent with other portions of his testimony, with natural probabilities, or other evidence, or the conduct of the witness was such as to throw suspicion upon his credibility. *Kansas City S. R. Co. v. Cockrell*, 169 Ark 698, 277 SW 7; *Skillern v. Baker*, 82 Ark 86, 100 SW 764; *Simon-Newman Co. v. Woods*, 85 Cal App 360, 259 Pac 460; *Nelson v. Lunt*, 74 Colo 265, 220 Pac 1006; *White v. Ross*, 35 Fla 377, 17 So 640; *Woodsmall v. Myers*, 87 Ind App 69, 158 NE 646; *Oleson v. Hendrickson*, 12 Iowa 222; *Hugumin v. Hinds*, 97 Mo App 346, 71 SW 479; *Schmidt v. Marconi*, 86 NJL 183, 90 Atl 1017, Ann Cas 1918B 131; *Robinson v. Zappas*, 227 App Div 208, 237 NY Supp 235 (in New York the general rule is said to be that, although the testimony of a party of interested witness, is uncontradicted, his interest in the result of the action makes his credibility a question for the jury); *Anniston Nat. Bank v. Durham*, 121 NC 107, 28 SE 134; *Matlock v. Scheuerman*, 51 Or 49, 93 Pac 823, 17 LRA(NS) 747; *Second Nat. Bank v. Hoffman*, 229 Pa 429, 78 Atl 1002; *Duncan v. Carson*, 127 Va 306, 103 SE 665, 105 SE 62; *Gibson v. Chicago, etc. R. Co.* 61 Wash 639, 112 Pac 919.

The testimony of a party to a scheme to defraud his creditors is subject to the discredit which attaches to a person engaged in such a plan. *Munoz v. Wilson*, 111 NY 295, 18 NE 855; *Wright v. Barnard* (DC) 248 Fed 756 (later appeal in (DC) 264 Fed 582); *Nelson v. Warren*, 93 Ala 408, 8 So 413.

In the event there arises any question whether the testimony of an interested witness is consistent with the physical facts as related by him, the truth of his testimony is obviously a question for the jury, notwithstanding the fact that no contradictory evidence is offered. *Kansas City S. R. Co. v. Whitley*, 139 Ark 255, 213 SW 369.

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DIRECTORS, LIABILITY FOR DEFALCATIONS

Matters of inquiry which counsel should consider in his preliminary evaluation of the case are as follows:

- 1—How often were directors meetings held during the period involved in the case?
- 2—What is the attendance record of the various directors during such meetings?
- 3—What records exist showing the matters discussed during such directors meetings?
- 4—What independent inquiry, if any, was instituted by a member of the board of directors?
- 5—What reports were rendered covering the accounts of the delinquent employee, who examined these reports, how often rendered, what action was taken in verification of the reports?
- 6—What officers rendered reports to the board of directors, and to what extent were same examined by members of the board?
- 7—Did any directors examine the books of account? Or question individual officers or employees?
- 8—In what specific respects would any greater degree of care and diligence by the directors have averted the loss?

Corporate directors may be held liable for defalcations of an officer or employee of the corporation, where such loss is due to the lack of reasonable care and diligence on the part of such director. See cases collected in 2 ALR 871.

Complete ignorance of the defalcations or irregularities is no defense. *Warren v. Robison*, 19 Utah 289, 57 Pac 287.

“When sued for losses which resulted from careless or unlawful acts and unfortunate transactions, they can never set up as a defense that they did not examine the books or accounts of the bank, knew nothing about the loans or discounts, were ignorant of banking business, or that they intrusted the management and supervision of the business to the executive officers, in whom they had confidence.” *Ibid.*

Liability may be created in the instance of bad loans made by bank officers, where due diligence on the part of the directors might have averted such losses. *Trustees Mut. Bldg. v. Bosseiz*, 3 Fed 817.

"It would . . . seem that the defendant directors were remiss in the discharge of their duties in not knowing, when it was their duty to know, that loans were being made by the bank in violation of the statute, and to persons in amounts larger than its capital. They were guilty of gross neglect in leaving the entire management of the business of the bank to the cashier. And it is no excuse for the want of diligence to say that they had no benefit from it, and that their services were gratuitous, when, by the exercise of ordinary care, they could have prevented the disastrous consequences which flowed from the want of such care." Ibid.

A concise and well stated summary of the duties of bank directors is contained in the following holding: "(1) Directors are charged with the duty of reasonable supervision over the affairs of the bank. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision over its affairs.

"(2) They are not insurers or guarantors of the fidelity and proper conduct of the executive officers of the bank, and they are not responsible for losses resulting from their wrongful acts or omissions, provided they have exercised ordinary care in the discharge of their own duties as directors.

"(3) Ordinary care, in this matter, as in other departments of the law, means that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances.

"(4) The degree of care required further depends upon the subject to which it is to be applied, and each case must be determined in view of all the circumstances.

"(5) If nothing has come to the knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient. If, upon the other hand, directors know, or by the exercise of ordinary care should have known, any facts which would awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them.

"(6) Directors are not expected to watch the routine of

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every day's business, but they ought to have a general knowledge of the manner in which the bank's business is conducted, and upon what securities its larger lines of credit are given, and generally to know of and give direction to the important and general affairs of the bank.

"(7) It is incumbent upon bank directors, in the exercise of ordinary prudence, and as a part of their duty of general supervision, to cause an examination of the condition and resources of the bank to be made with reasonable frequency." *Rankin v. Cooper*, 149 Fed 1010.

In another case it was held: "All authorities now tend to the conclusion that directors of banks and other moneyed corporations hold the relation to stockholders, depositors, and creditors of trustees to *cestuis que trust*, and as such are personally responsible for frauds and losses resulting from gross negligence and inattention to the duties of their trust." *Trustees Mut. Bldg. Fund v. Bosseix*, 3 Fed 817.

It is clear that no general rule can be propounded as to the precise degree of care properly exacted of a bank director, as each case depends upon its own peculiar facts and circumstances. This observation is well stated in the following:

"It cannot be the rule that the director of a bank is to be held to the same ordinary care that he takes of his own affairs. He receives no compensation for his services. He is a gratuitous mandatory. His principal business at the bank is to assist in discounting paper, and for that purpose he attends at the bank at stated periods—generally once or twice a week—for an hour or two. The condition of the bank is then laid before him in order that he may know how much money there is to loan. Once or twice a year there is an examination of the condition of the bank, in which he participates. The cash on hand is counted, the bills receivable and sureties examined, to see whether they correspond with the statements as furnished by the officers. Beyond this he has little to do with either the cash or the books of the bank. They are in the care of salaried officials who are paid for such services, and selected by reason of their supposed integrity and fitness. To expect a director, under such circumstances, to give the affairs of the bank the same care that he takes of his own business, is unreasonable, and few responsible men would be willing to serve upon such terms. In the case of a

city bank, doing a large business, he would be obliged to abandon his own affairs entirely. A business man generally understands the details of his own business, but a bank director cannot grasp the details of a large bank without devoting all his time to it, to the utter neglect of his own affairs." *Swentzel v. Penn Bank*, 147 Pa 140, 30 Am St Rep 718, 23 Atl 405.

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**DRY CLEANER, LOSS OR DAMAGE
OF CLOTHING**

(See Laundry, Loss or Damage of Clothing)

**DYEING ESTABLISHMENT, LOSS OR DAMAGE
OF CLOTHING**

(See Laundry, Loss or Damage of Clothing)

EASEMENT, UNLAWFUL INTERFERENCE WITH

(Action to restrain interference with use of alley)

Q—You are the plaintiff in this action?

Q—Do you maintain a place of business at 28 Jay Street in this city?

Q—What is the nature of your interest in the building at that address? A—I lease the building.

(A copy of the lease, or other evidence of title, should be presented at the trial.)

(The proof should establish the plaintiff's right to use of the alley, or other part of property forming the subject of the easement.)

Q—How long have you used such alley?

Q—Did you, at any time, grant permission to the defendant to make use of such alley?

Q—I show you a photograph, and ask if this substantially reproduces the alley next to your place of business?

(Marked in evidence.)

(The proof should show in detail the specific acts relied upon as constituting an interference with the easement.)

An easement may form the basis of an action to restrain acts constituting an unlawful restraint of the same, or in any manner affecting the full enjoyment thereof. *Adams v. Marshall*, 138 Mass 228, 52 Am Rep 271.

Thus, a person who has the right of enjoyment of an easement in an alleyway, or passageway, may maintain an action against one infringing upon such right. *National Accident & Health Ins. Co. v. Workmen's Circle*, 289 Pa 164, 137 Atl 184, 55 ALR 908.

The owner of the fee in a passageway upon which his building abuts may enjoin the owner of a building on the opposite side from maintaining fire escapes which project out over the passageway. It is not necessary in a case of this character to make others having easements in the passageway parties to the suit. *Zimmerman v. Finkelstein*, 230 Mass 17, 119 NE 194.

An abutting owner who is deprived of the use of a street because of an ice chute connected with an adjoining structure may enjoin the obstruction as interference with his only rea-

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sonable access to his property. *Young v. Rothrock*, 121 Iowa 588, 96 NW 1105.

The owner of an alley was held in *Gillespie v. Weinberg*, 148 NY 238, 42 NE 676, to have the right to enjoin the defendant, an adjoining property owner, who had the right to use the alley for passing and repassing, from continuing an encroachment in the form of fire escapes, shutters, and shutter eyes, which extended over the alley.

It was held, however, in *Bitello v. Lipson*, 80 Conn 497, 69 Atl 21, 16 LRA(NS) 193, that the owner of the fee of a right of way will not be enjoined from extending a projection from his building partially across such way, where it will not interfere with any use which the owner of the easement can reasonably be expected to have need to make.

Where no adequate remedy at law exists, the plaintiff may sue in equity to restrain the unlawful acts.

Townsend v. Epstein, 93 Md 537, 49 Atl 629, 52 LRA 409, holding that an injunction may issue to restrain the obstruction of an easement of light and air only in those cases where the plaintiff is without an adequate remedy at law.

It is clear that the facts in each case will alone determine the proper remedy to pursue, although it may be stated that where the acts are part of a succession of events and a continuing course of action, equity will grant injunctive relief in order to avoid a multiplicity of suits, and preserve the immediate right of enjoyment in the plaintiff. *Mendelson v. McCabe*, 144 Cal 230, 77 Pac 915, 103 Am St Rep 78.

Similarly, if the acts are merely potential in character, or represented in threats, with reasonable probability of a consummation of such threats, equity will act. 17 Am Jur, p. 1036, § 152.

The plaintiff should be prepared at the trial to show the precise nature of his interest in the property and in the easement involved, the origin of such interest, and its existence at the time of the acts complained of, or at the time of the application. *Crosier v. Brown*, 66 W Va 273, 66 SE 326, 25 LRA(NS) 174.

It is not essential that the proof show ownership of the property in the complaining party, or any interest therein, other than such as will support his right to the use of the easement involved. *Darnell v. Columbus-Show-Case Co.* 129 Ga 62, 58 SE 631, 13 LRA(NS) 333.

Accordingly, a tenant under a lease may maintain the action for interference with his easement, to the same extent as a tenant for life. *Hamilton v. Dennison*, 56 Conn 359, 15 Atl 748, 1 LRA 287.

Damages for obstruction of an easement, or interference with the right of enjoyment thereof, are ordinarily limited to the monetary equivalent thereof. *Adams v. Marshall*, 138 Mass 228, 52 Am Rep 271.

Thus, where a complainant is able to show an obstruction of a right of way, he may recover damages for the loss of use of such passageway. *Rogers v. Stewart*, 5 Vt 215, 26 Am Dec 296.

It should be noted, however, that the damages recoverable are limited solely to such as result from impairment of the easement. *National Accident & Health Ins. Co. v. Workmen's Circle*, 289 Pa 164, 137 Atl 184, 55 ALR 908.

Where the evidence shows repeated or continuous interference with the plaintiff's rights, or a course of conduct establishing malicious intent, it has been held that punitive damages may be awarded. *Williams v. Esling*, 4 Pa 486, 45 Am Dec 710.

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EMINENT DOMAIN PROCEEDINGS, PROOF OF VALUE

(Matters to cover in showing value)

- Q—How long has claimant used property?
- Q—For what purpose was property used?
- Q—What is the character of the surrounding locality?
(Photographs, maps, surveys and diagrams should be used to clarify this factor.)
- Q—What is the character of the property immediately adjoining the claimant?
- Q—How long has the neighborhood remained in its present condition?
- Q—What indications are there that the neighborhood will change for the better in the immediate future?
- Q—Were any plans pending for the use of claimant's property for specific municipal purposes?
- Q—What offers for purchase of property were received prior to institution of condemnation proceedings?
- Q—What is rental value of premises?
- Q—Describe the structure upon premises.
(Use photographs.)
- Q—Were any parcels of land near the claimant's property sold shortly before condemnation proceedings instituted?
- Q—What was price paid?
- Q—If no sale was made, was any offer made?
(Show full circumstances of such offer.)
(The time of such sale, or offer, must not be too remote in point of time.)
- Q—Had the claimant contracted for any improvements to property?
- Q—When were such contracts made?
- Q—Describe the improvements in detail, and their general effect upon property.
(The use of expert testimony is generally indispensable in proof of value.)

An award in eminent domain proceedings should include all elements of damage, both present and prospective. Generally speaking, the measure of compensation is the price

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which would be agreed upon at a voluntary sale between the owner and a purchaser, or stated differently, the fair market value of the land. *Little Rock Junction R. Co. v. Woodruff*, 49 Ark 381, 5 SW 792, 4 Am St Rep 51; *San Diego Land & Town Co. v. Neale*, 88 Cal 50, 25 Pac 977, 11 LRA 604; *New Haven County v. Trinity Church*, 82 Conn 378, 73 Atl 789, 17 Ann Cas 432; *Boise Valley Constr. Co. v. Kroeger*, 17 Idaho 384, 105 Pac 1070; *Donovan v. Haverhill*, 247 Mass 69, 141 NE 564, 30 ALR 358; *Curley v. Jersey City*, 83 NJL 760, 85 Atl 197, 43 LRA(NS) 985.

"Market value" denotes that price which a purchaser would put upon the property in the event of a prospective sale, or the worth which the property has in the open market; it does not denote the price which the owner asks, or which in his mind represents the fair value of the property, nor does it represent what in the mind of the court should be a fair figure, considering the locality and nature of the property. The prime consideration is the price which all the available circumstances indicate as the bargaining price most likely to result in a sale. *New York v. Sage*, 239 US 57, 60 L ed 143.

The statutes of the particular jurisdiction should be consulted for provisions relative to right of recovery in eminent domain proceedings, and the procedure incident thereto.

In the event the property has no market value, or the circumstances are such as to preclude application of this test, then the value must be judged by a consideration and evaluation of those factors which would influence two persons bargaining for the property. *Idaho-Western R. Co. v. Columbia Conference*, 20 Idaho 568, 119 Pac 60, 38 LRA(NS) 497.

Proof as to any items of value must be confined to the condition and situation of the property at the time it is taken under eminent domain. *United States v. First Nat. Bank*, 250 Fed 299, Ann Cas 1918E 36.

It may be noted that the determinative factor in eminent domain proceedings is the value of the land to the party from whom it is taken, or the estimate which can fairly and equitably be placed upon the worth of such land as judged from the actual or possible use to which the owner is entitled to make, as distinguished from the value to the party taking the land. Thus, the consideration that private land is being taken for a much needed public improvement, or a very laud-

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able public project, should not influence any determination as to value of the property to the owner. *McGovern v. New York*, 229 US 363, 57 L ed 1228.

Exceptional peaks of value predating the taking of the property, or speculative increases subsequent thereto, furnish no guide to value, although where the defendant has already taken possession of the property, either partially or entirely, and has as a result depreciated the value, courts will ordinarily endeavour to adjust the market value at a date that will harmonize with the true market price and the actual loss sustained. *Pappenheim v. Metropolitan Elev. R. Co.* 128 NY 436, 28 NE 518, 13 LRA 401.

It is improper to consider sentimental values, such as the owner's feeling for the property, or his unwillingness to part with possession thereto; similarly mere inconvenience incident to moving or seeking another place can have no consideration in an assessment of market value or actual loss. *Madisonville, etc. R. Co. v. Ross*, 126 Ky 138, 103 SW 330, 13 LRA (NS) 420.

It was held in *Des Moines Wet Wash Laundry v. Des Moines*, 197 Iowa 1082, 198 NW 486, 34 ALR 1517, that the nature of machinery installed on leased premises, the cost thereof, and the way it was attached to the property, are pertinent factors to be considered in determining the value of the leasehold; but not as evidence of independent items of damage.

The actual cost of removal of fixtures upon property taken under eminent domain proceedings is not a factor in proof of damage, upon the theory that all property is held subject to the implied condition that it must be surrendered whenever public interest requires. *Ibid.*

In some instances, the question of value will arise without a taking of the property involved, as where the land is damaged in value or the use of the property impaired. Where the courts of a particular jurisdiction allow compensation for such factors, the rule is that the measure of damages is the diminution of the market value of the property, or the difference between the fair market value of the property before and after it is damaged. *Armstrong v. Seattle*, 180 Wash 39, 38 P(2d) 377, 97 ALR 826.

In estimating value in eminent domain proceedings, the

court is not limited to the actual use of the property at the time of taking; it may consider the uses to which the property may be adapted in the future, considering all the facts and circumstances in the case, such as the present needs of the community, the trend toward a change in the character of the locality, and similar factors. *Mississippi River Boom Co. v. Patterson*, 98 US 403, 25 L ed 206; *Portland & R. R. Co. v. Deering*, 78 Me 61, 2 Atl 670; *Emmons v. Utilities Power Co.* 83 NH 181, 141 Atl 65.

But speculative uses may not be considered in this connection; there should be a tangible basis for the estimate made, a basis grounded in practical considerations, as distinguished from imaginative values. *McGovern v. New York*, 229 US 363, 57 L ed 1228.

It was held in *Maynard v. Nemaha Valley Drainage Dist.* 94 Neb 610, 143 NW 927, 52 LRA(NS) 1004, that profits which may possibly be derived in the future from the use of the water power for the development of electricity are too speculative to furnish a basis for damages in eminent domain proceedings for the removal of a dam, where the claimant furnishes no proof of any immediate intention to make such use of the development, or any practical basis for a belief that such use will be made in the near future.

Proof as to value should include the practical consideration of the suitability of the land to the specific public use for which it was taken. Thus, if land is ideally situated for use as a public park, new road, or municipal water supply, this factor will undoubtedly influence prospective purchasers of the same, and render the land more readily salable and at a higher figure than under ordinary circumstances. Such potential factors have a direct bearing upon the market value of the property at the time of its taking. *Little Rock Junction R. Co. v. Woodruff*, 49 Ark 381, 5 SW 792, 4 Am St Rep 51; *Idaho Farm Development Co. v. Brackett*, 36 Idaho 748, 213 Pac 696; *Brack v. Baltimore*, 125 Md 378, 93 Atl 994; *Smith v. Com.* 210 Mass 259, 96 NE 666; *Currie v. Waverly*, etc. R. Co. 52 NJL 381, 20 Atl 56; *Alloway v. Nashville*, 88 Tenn 510, 13 SW 123, 8 LRA 123.

The mere possibility that one seeking land under eminent domain proceedings may in the future secure the right from the legislature to carry water upon the land to nearby com-

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munities, is not a factor in determining the value of the property in the market place. *Sargent v. Merrimac*, 196 Mass 171, 81 NE 970, 11 LRA(NS) 996.

The courts are not entirely clear upon the question of recovery for loss to business, or loss of profits, as a result of the taking of property under eminent domain. According to the better view, and the one more generally followed, no recovery is possible for such monetary loss as is represented by the loss of good will incidental to removal of a business, loss of profits, inconvenience in moving, or similar injury to a business.

Mitchell v. United States, 267 US 341, 69 L ed 644, holding that the mere fact that a business is destroyed by a taking of the property upon which it is located, does not, of itself, constitute a taking of the business, or a destruction of the same, for which the owner is entitled to compensation.

In most jurisdictions, interest is allowed as part of the damage to which one is entitled as a result of taking of property under eminent domain. There is, however, considerable variance in the precise date from which interest is to be computed. In some jurisdictions, it is computed from the time of actual taking, or from the time of the commencement of the proceedings, and in some instances, from the time of the actual award. *Brown v. United States*, 263 US 78, 68 L ed 171; Annotation: 96 ALR 154, 165.

In presenting opinion evidence as to value, the claimant should offer a substantial basis for the qualification of the witness as an expert. The more qualified a witness is in this connection, the greater weight will attach to his opinion. Where one of the issues involved is value upon a specialized phase of loss, or use of property taken or damaged, the witness should be shown as properly qualified by experience in such specialized phase. In some jurisdictions, the opinion of a witness is excluded as to the specific amount of damage sustained, but is limited to the value before and after the damage to the property. See cases collected in 18 Am Jur p 1002, § 356.

**EMPLOYER, LIABILITY FOR TORTS OF
INDEPENDENT CONTRACTOR**

Q—You are the plaintiff in this action?

Q—Do you recall the 19th day of January, 1943?

Q—What, if anything, happened to you at that time? A—I was walking along Hall Street when a brick from a partly demolished building struck me on the head.

Q—Near where on Hall Street did this happen? A—In front of 78 Hall St.

Q—Did you see a shed or scaffolding over the sidewalk in front of this building?

Q—Did you notice men working about the building? A—Yes.

Q—What were these men doing, as near as you could observe? A—They were demolishing the building, tearing out parts, knocking out bricks, etc.

(For proof of negligence in case of falling objects, see Section 261, Trial Manual for Negligence Actions.)

(An examination before trial should always be had in cases of this character to clarify the relationship between the employer and contractor; and the results of such examination made available for use at the trial.)

The broad rule generally prevails that in those instances where the work performed by a contractor is of such a nature that its performance necessarily causes injury to third persons, or damage to their property, the employer is liable; but in the event the damage or injury is the result of negligence on the part of the contractor, no liability attaches to the employer. *Alexander v. Sherman*, 86 Conn 292, 85 Atl 514; *Eaton v. European & N. A. R. Co.* 59 Me 520, 8 Am Rep 430; *Bonaparte v. Wiseman*, 89 Md 21, 42 Atl 918; *Loth v. Columbia Theatre Co.* 197 Mo 328, 94 SW 847; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn 495, 28 Atl 32.

In the case of *Southern R. Co. v. Lewis*, 165 Ala 555, 51 So 746, it was stated: "If the work to be done by the contractor cannot be done without danger or injury to third parties, if its very nature and existence are such as to cause or produce danger or injury, the owner, master, or contractor is liable as if he performs it himself."

As has been stated: "The distinction is well established be-

tween the cases in which, when work is being done under a contract, an injury is caused by negligence in a matter collateral to the contract, and those in which the thing contracted to be done causes the mischief. In the former class of cases the employer is not liable for the injury, but in the latter he is." *Bonaparte v. Wiseman*, 89 Md 21, 42 Atl 918.

The distinction is summarized in one case as follows: "If the act complained of be within the scope and in the course of the employment,—that is, if it is a thing necessary to be done to carry out or complete the work about which the servant was employed,—then the employer is responsible for any damages resulting from any negligence on the part of the servant or his employee; and it would make no difference, as to the responsibility of the master or employer, that he did not authorize the particular act complained of, or did not know of the act or neglect of the servant or employee." *Brown v. McLeish*, 71 Iowa 381, 32 NW 385.

The general or basic rule is, of course, that "all parties participating in a wrongful act, directly or indirectly, whether as principals, or agents, or both, are jointly and severally liable in damages for the wrong, where injury results; and it is upon this principle that the owner or proprietor is liable for the act of an independent contractor, where the contract itself calls for the doing of an act causing the injury and damages, and that act is done in pursuance of the contract." *Scoggins v. Atlantic Cement Co.* 179 Ala 213, 60 So 175.

This liability is based upon the concept that the employer and contractor are joint tort-feasors, and engaged in a joint enterprise. *Alabama Midland R. Co. v. Coskry*, 92 Ala 254, 9 So 202. See also in this connection: *Alexander v. Sherman*, 86 Conn 292, 85 Atl 514; *Eaton v. European & N. A. R. Co.* 59 Me 520, 8 Am Rep 430; *Bonaparte v. Wiseman*, 89 Md 21, 42 Atl 918; *Loth v. Columbia Theatre Co.* 197 Mo 328, 94 SW 847; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn 495, 28 Atl 32.

Where the employer undertakes to supervise, direct or control the work being performed, then he becomes liable for any injuries or damages caused by acts of the contractor, regardless of the character of the work being performed. *Kellogg v. Payne*, 21 Iowa 575.

The decisions further affirm the liability of the employer

for acts of the contractor where the work involved will necessarily entail a violation of a statutory provision or a municipal ordinance. *Uppington v. New York*, 165 NY 222, 59 NE 91; *Douglas v. Peck*, 89 Conn 622, 95 Atl 22.

A similar result would obtain where the employer failed to secure permission of an official body for performance of the work, as required by law. *Congreve v. Smith*, 18 NY 79.

As has been stated in this connection:

"The fact chiefly relied upon in the defendant's behalf, that the injury resulted immediately from the negligence of a contractor who was doing the work upon his own responsibility and was bound by his contract with the defendant to guard, by proper precaution, against accidents, does not constitute a defense to the action. The excavation was made on the defendant's account, and at his request, in a public street, for a private purpose of the defendant, in which the public had no interest, and, so far as the case discloses, without the consent of the corporate authorities. The act of making the excavation was wrongful, without reference to the manner in which it was made or secured. The defendant was, therefore, liable for the injury which the excavation produced to third persons, without fault on their part, whether the workmen were guilty of negligence or not. The basis of the defendant's liability is his own wrongful act in procuring the excavation to be made without authority, and not the negligence of the contractor, or his workmen, in performing or guarding the work." *Creed v. Hartmann*, 29 NY 591, 86 Am Dec 341.

Where the work performed necessarily operates to create a nuisance, by the very nature of such work, the employer is generally made liable to third persons injured by the acts of the contractor. *Murphy v. New York*, 128 App Div 463, 112 NY Supp 807.

"There is no doubt that, where the work contracted for will itself cause a nuisance, the principal as well as the contractor becomes liable for the damages resulting therefrom; but this rule does not apply when the nuisance lies, not in the work contracted for, but in the means adopted by the contractor for carrying out the work." *Murphy v. New York*, 128 App Div 463, 112 NY Supp 807.

An application of the rule denying liability on the part of the employer is seen in the case of the building of a struc-

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ture, as a building, abutting a public street, and an injury resulting to a pedestrian through the negligent construction of a scaffolding projecting over the sidewalk; in such case it was held no liability attached to the employer of the contractor. *Mann v. Max*, 93 NJL 191, 107 Atl 417, where it was held: "A reasonable and proper scaffold being permissible, it was presumably lawful for the mason contractor to erect one; and a scaffold would not be, under the circumstances, a nuisance per se, but, as we have said, a legitimate appliance for building purposes. And the rule is thoroughly settled that, where one employs a contractor exercising an independent employment and hiring his own servants to do a work not in itself a nuisance, the contractor alone is liable for an injury resulting from the negligence of himself or his servants, unless the employer is in default in selecting an unskilful or an improper person as contractor."

"It is plain that the building of the new building was not a nuisance per se; nor was the doing of the masonwork thereon, contracted by Balene to Giordano; nor, as we have said, was the erection of a proper scaffold for the execution of that work. The owner had no control over either contractor as to the methods of his work; so that if Balene or Giordano, in executing their contracts, unreasonably obstructed the street by needless piles of rubbish, or an improper scaffold, Max had no power to intervene, except as a member of the public, and hence could not be accountable to a passer-by injured by a falling brick, or, as, in this case, a projecting timber of a scaffold in use for the laying up of the wall. The building was unfinished, and normally such a scaffold would remain till no longer needed for the front wall, which was under erection; so the question of its maintenance for an unreasonable time is out of the case."

An employer may be made liable for injuries to person or property through the creation of conditions for which he is partly or entirely responsible, provided it can be shown that such injuries or damage are traceable to such conditions. *Cuff v. Newark & N. Y. R. Co.* 35 NJL 17, 10 Am Rep 205.

A contractor that follows the plans of his employer in making an excavation, and thereby causes a weakening of the lateral support of an adjoining building, will impose liability upon the employer. *Chicago v. Norton Mill Co.* 97 Ill App 651, affirmed 196 Ill 580, 63 NE 1043.

Similarly, liability will be imposed where a contractor follows plans prepared by an employer and drives piles into the ground for a foundation, causing an adjacent building to subside. *Eagan v. Hotel Grunewald*, 129 La 163, 55 So 750.

Blasting operations by a contractor, in accordance with directions of the employer or done with his consent and knowledge, have been held to impose liability upon the employer for resulting damages or injuries. *Tremain v. Cohoes*, 2 NY 163, 51 Am Dec 284.

Thus, in one case involving the liability of an employer for blasting operations of a contractor, the court commented:

"No proof was given that the work was not prosecuted with care and prudence, or that the injury was not the unavoidable consequence of blasting in that particular locality. Now, it seems very clear that the contractors did nothing that the defendants had not authorized to be done. But the defendants had no right to use their own lands, or authorize others to use them, so as to interfere with the undisturbed possession and lawful enjoyment of adjoining lands. We do not construe the agreement as absolutely binding the contractors to remove the rock in this particular manner. They might, undoubtedly, have adopted other and more expensive modes of doing it, without affording the defendants any cause of complaint. But nothing of that kind was contemplated. The defendants put them in possession, with the right to remove rock, wherever found, in the manner mentioned in the contract; and having enjoyed the benefits of this cheaper mode of doing the work, they cannot escape the responsibilities attending it. If they reserved no power to prevent injury where blasting could not be safely employed, they were clearly in fault in giving so unrestricted a license. If they had the power, it is almost equally clear they should have exerted it."

Where the work is of such character that there exists no need for operations of a dangerous character, and the contractor takes it upon himself to create a condition of potential danger to third persons, the employer is not liable for resulting damages. *Callahan v. Salt Lake City*, 41 Utah 300, 125 Pac 863.

In this case, denying liability upon the part of a municipality for acts of a contractor, the court pointed out:

"Neither was the work contemplated by the contract of

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such a character that its execution would necessarily cause the ditch or gutter to be filled, or choked up, or interfered with so as to affect the flow of water therein. Indeed, it is clear from the terms of the contract and the character of the work that it was not intended that the contractor should interfere with the street, outside of that portion which he was to prepare for paving and which he agreed to pave. The contract, therefore, does not come within the rule that the contractee cannot escape liability where the doing of the work contracted for necessarily brings about the conditions from which the injuries complained of follow as a result."

A detriment factor in gauging liability of an employer is whether the work would have produced any injurious consequences had it been performed with reasonable care under the circumstances. Annotation: 21 ALR 1259.

Where it appears that the work was of a character that did not involve danger, or was not inherently dangerous in its execution, but only became so because of the recklessness or negligence of the contractor, then the employer may be absolved from liability. Annotation: 21 ALR 1259.

The determination of this question is largely one of fact for the jury to evaluate in the light of all the surrounding circumstances. *French v. Vix*, 21 NY Supp 1016, affirmed 143 NY 90, 37 NE 612.

Stated differently, the question is frequently posed: did the danger result from the manner in which the work was performed, or the essential character of the work itself. *French v. Vix*, 21 NY Supp 1016, affirmed 143 NY 90, 37 NE 612.

The distinction is aptly illustrated in the following holding, in the case of blasting operations:

"Did the damage necessarily result from the nature of the work itself, or did it result from the manner in which the work was performed? If the work done was bound to produce the result, the person for whose benefit the work is done cannot shield himself by showing that the work was done by an independent contractor. But if it resulted from the method in which the work was done, the person benefited having no control over such method, or of the persons pursuing it, then the contractor is solely liable. It remains, then, to be determined whether work of which blasting forms an essential part is dangerous in itself, or whether it is devoid of danger unless

improper methods are used in the employment of it. The tendency of courts in this state, at first, was toward the view that it was inherently dangerous, and that a person employing another to do such work would be responsible for injuries arising therefrom, without showing negligence on his part. But the later decisions all tend to hold that blasting is not dangerous in itself, and we think that view is now firmly established by the courts of this state. Those authorities all establish that blasting rock does not necessarily cause injury, and that damage arising therefrom is solely the result of employing it negligently, and that, when the work is done by an independent contractor, he only is responsible for such damage. In other words it seems to be the settled law of the courts of this state that they will take judicial notice that blasting is not injurious to persons or property per se, or unless conducted in a negligent manner." *Ibid.*

Acts of a contractor which are unauthorized, and done without the consent, knowledge or permission of the employer, and which lack any justification or excuse in the contract of employment, will not operate to impose any liability on the employer. *Ketcham v. Newman*, 141 NY 205, 36 NE 197.

Thus, an employer was held not liable for acts of a contractor in entering adjoining property, where no need for such trespass existed, and no authority or justification therefor existed. *Ibid.*

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EMPLOYMENT CONTRACT, DURATION OF

- Q—You are the plaintiff in this action?
- Q—What is your occupation?
- Q—Were you employed at any time by the defendant in this action? A—I was.
- Q—When did you first start working for the defendant? A—October 1st, 1944.
- Q—Who hired you? A—John Pratt, the General Manager.
- Q—Please tell this court and jury the substance of any conversations you had with John Pratt relative to your hiring? A—He told me my yearly salary would be \$3000, and that I would be paid by the month.
(If there is a written agreement, or any writing evidencing the agreement of the parties, it should be properly identified and introduced in evidence.)
- Q—When did you receive your first pay? A—A month after I started work.
- Q—And for how long did you continue to work for the defendant?
- Q—What conversations, if any, took place between the General Manager and yourself during that time respecting your pay? A—He told me my pay would be increased ten percent the second year of my employment.
- Q—Please tell us the substance of that conversation. A—He told me my pay would be \$3300, payable in monthly installments, and that I could consider myself hired for another year, etc.

According to some decisions, a hiring at a stated price or wage for a specified period, as a week, month or year, is equivalent to a hiring for the period of time named. *Great Atlantic & P. Tea Co. v. Summers*, 25 Ala App 404, 148 So 332; *National Life Ins. Co. v. Ferguson*, 194 Ala 658, 69 So 823; *Shuler v. Corl*, 39 Cal App 195, 178 Pac 535; *National Manufacture & Stores Corp. v. Dekle*, 48 Ga-App 515, 173 SE 408; *Odom v. Bush*, 125 Ga 184, 53 SE 1013; *Maynard v. Royal Worcester Corset Co.* 200 Mass 1, 85 NE 877; *Ross v. Fair*, 145 Miss 18, 110 So 841; *Godson v. MacFadden*, 162 Tenn 528; *Alkire v. Orchard Co.* 79 W Va 526, 91 SE 384; see also cases collected in 11 ALR 471.

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As has been stated "it seems to be rather uniformly held that the circumstances of agreeing on weekly, monthly, quarterly, or semi-annual payments of wages is sufficient of itself to establish the presumption of a hiring for the period covered by cash payment." *Putnam v. Producers Live Stock Marketing Assn.* 256 Ky 196, 75 SW(2d) 1075.

Thus, in one instance where the plaintiff was hired at "\$150. per month," it was stated by the court: "There is no proof of custom or usage with reference to the period of employment for this character of service, and we are left entirely to the somewhat indefinite words of the contract to determine whether or not it constituted a contract for a period of service for a year, or whether it was merely an employment at will. The question is by no means free of doubt, and the authorities . . . are sharply conflicting. . . . One line of cases holds that a hiring at so much per year, month, or week is, in the absence of other circumstances controlling its duration, an indefinite hiring only, terminable at the will of either party; whereas the other line of authorities holds to the view that, where the matter of duration in a contract of employment is not specified in so many words, a hiring being at a specified rate per year, month, or week imports a hiring for the full period named. . . . The weight of authority is declared to be in favor of the rule that a hiring at so much a year, month or week is, in the absence of any other consideration impairing the force of the circumstances, sufficient to sustain a finding that the hiring was for that period." *Moline Lumber Co. v. Harrison*, 128 Ark 260, 194 SW 25, 11 ALR 466.

It has been held that where an employee is hired under circumstances which indicate some expectation of permanency, but the salary was paid weekly, and no definite contract entered into, that the hiring was upon a weekly basis, terminable upon a week's notice. *Fiddes v. Famous Players*, 34 Manitoba LR 476.

There is also authority for the view that where a person is hired for a specified sum per week, month, or year, that the hiring is indefinite, and may be terminated at will by the employer. *Marquam v. Domestic Engineering Co.* 210 Ill App 337; *Clay v. Louisville & N. R. Co.* 254 Ky 271, 71 SW(2d) 617; *Exchange Bakery & Restaurant v. Rifkin*, 245 NY 260,

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157 NE 130; Bulkley v. Kaolin Products Co. 187 App Div 103, 175 NY Supp 219; Title Ins. Co. v. Howell, 158 Va 713, 164 SE 387.

Thus the view is noted that a hiring at a stated amount per week, month or year, creates no legal presumption that the hiring is for that particular period, and that unless a definite period is stated in the contract of employment, or otherwise provided by agreement, the law will presume a hiring at will. Haldeman v. Read Machinery Co. 80 Pa Super Ct 578.

An application of this ruling is seen in the holding that where a person is hired for no definite period of time and is to be paid monthly, the employment can be terminated at the will of either party; so that where the employer discharges the worker during the middle of a month, the latter is not entitled to recover salary for the last half of that month. Hubbard v. Turner Department Store, 220 Mo App 95, 278 SW 1060.

Similarly the courts have held that where a person is hired upon a yearly salary, in addition to commission and profit percentage, that the employment is for an indefinite period and may be terminated at will. Donnellan v. Halsey, 114 NJL 175.

An agreement to pay a specified sum per month does not constitute a contract for a year, notwithstanding there is a provision for a bonus in the event the total year's business warrants same. Thompson v. Read Phosphate Co. 18 Ga App 535, 89 SE 1048.

In one case, where the court held a contract of employment to be binding for no longer than a month, it appearing that the salary was to be paid by the month with no duration of employment specified, the theory of law was stated in the following: ". . . it is only by a fiction that the courts are enabled to hold that an engagement at a fixed salary per month, but with no stipulation as to its duration, is a legally binding contract for one month's employment at the agreed wage, upon the supposition that the contracting parties had in contemplation a definite hiring for one month only; either party to then have the right of regarding the engagement as at an end, or of treating the contract as continuing of force upon the same terms as to wages till notice was received from the other of his election to terminate the relation of master and servant." Odom v. Bush, 125 Ga 184, 53 SE 1013.

Upon the same theory, courts have held that an agreement to pay so much per year, is valid as a contract of employment for a full year. *Liddell v. Chidester*, 84 Ala 508, 4 So 426.

Where the employer hired a worker upon a monthly salary but regularly informed the worker at the beginning of each year what his salary would be for that year, the hiring was held to be by the year, rather than an indefinite period. *Pfeil v. Christian Feigenspan*, 97 NJL 3, 116 Atl 793.

There is authority to the contrary, however, holding that a hiring at a specified sum, at a fixed amount per year or month, is indefinite as to duration and terminable at will, by either party. *Feiber v. Home Silk Mills*, 143 NY Supp 321; *Gibney v. National Jewelers Bd. of Trade*, 144 NY Supp 321; Annotation: 11 ALR 479.

"The mere fact that his salary was fixed at \$10,000. per year does not alone justify the conclusion that his employment was by the year, especially where he drew his pay regularly by the month." *Russell v. White Oil Co.* 162 La 9, 110 So 70.

It is also noted that "The fact that a salary is paid or payable monthly is not inconsistent with an employment for a specified longer period." *Eberle v. C. C. Tank & Boiler Works*, 5 La App 268.

It is, of course, clear that extraneous circumstances will vary the application of the above rules; they do not admit of general and binding application in all cases that may arise under this classification. The circumstances in one case may be such as to call for an interpretation of an indefinite hiring contract completely different from that followed in another case, notwithstanding the wording of the agreement is identical. *Moline Lumber Co. v. Harrison*, 128 Ark 260, 194 SW 25, 11 ALR 466; *Davis v. Englestein*, 263 Ill App 57; *Morris Shoe Co. v. Coleman*, 187 Ky 837, 221 SW 242; *Loew v. Hayes Mfg. Co.* 218 Mich 595, 188 NW 360; *Weir v. Ryan*, 68 Mont 336, 219 Pac 947; *Cudney v. Phillips*, 181 App Div 257, 168 NY Supp 268.

See also: *National Life Ins. Co. v. Ferguson*, 194 Ala 658, 69 So 823; *Shuler v. Corl*, 39 Cal App 195, 178 Pac 535; *Odom v. Bush*, 125 Ga 184, 53 SE 1013; *Maynard v. Royal Worcester Corset Co.* 200 Mass 1, 85 NE 877; *Gabriel v. Opoznauer*, 153 NY Supp 990, 89 Misc 611; *Gibney v. National Jewelers Bd.*

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of Trade, 144 NY Supp 321; *Feiber v. Home Silk Mills*, 143 NY Supp 321; *Alkire v. Orchard Co.* 79 W Va 526, 91 SE 384.

This view has found apt expression in the following statement: "In determining the duration of the employment under a contract whereby a person is hired or employed without any specific agreement as to the period of service or employment, regard must be had to the circumstances of each particular case. A contract as to the period of service, when such period is not definitely expressed, may be controlled by custom, by the nature of the employment or service, by the cost in this respect the parties placed on the contract, or even by the manner, in respective time, in which payment of wages or salaries is made." *Dallas Hotel Co. v. McCue*, 25 SW(2d) 902 (Tex Civ App.)

Elsewhere it is stated: "Controlled by that general concept or canon of construction, it seems to be rather uniformly held that the circumstances of agreeing on weekly, monthly, quarterly, or semiannual payments of wages is sufficient of itself to establish the presumption of a hiring for the period covered by each payment. But, when the agreement was for employment at a specified compensation per year, the decisions are not in accord as to the effect of such provision in relation to the duration of the contract. There is a line of cases holding that employment at a certain sum per month or year is so indefinite as to constitute only a contract terminable at will. . . . On the other hand there are cases to the effect that the stipulation of compensation at a certain annual sum will of itself warrant the conclusion that the employment was for a year." *Putnam v. Producers Live Stock Marketing Asso.* 256 Ky 196, 75 SW(2d) 1075.

Thus, in one case the contract of employment stated as follows: "We herewith engage you at a salary of \$5,200. to be paid in weekly instalments of \$100." It was held that this implied a full year's employment. As stated: "If the intention was merely to hire the plaintiff at a salary of \$100. per week for whatever period the defendants chose to keep her, it would have been easy to say so, and nothing would have been said about a salary of \$5,200. to be paid in weekly instalments of \$100. or about the employers' right of discharge should any representations be found false. The agreement, it will be noted, was to pay a salary of \$5,200. not a salary at a rate of

\$5,200. per year, as in cases relied on by the defendants, and the plaintiff was discharged before she received the \$5,200. stipulated. If it had been intended to give an absolute right to discharge at any time, Opoznauer could readily have so stated, without leaving it to inference, and would hardly have taken pains to create a tissue of provisions negating the possibility of such an inference." *Gabriel v. Opoznauer*, 153 NY Supp 990, 89 Misc 611.

In another case, it appeared that the parties entered into a contract for a specified salary per year, to be paid until further notice. It was held that this agreement did not prevent discharge at any time after expiration of the year named therein: "We think that the evidence shows conclusively that the plaintiff accepted employment upon the terms stated in the writing, which were that he should be paid a salary of \$1200 per year until further notice. It might be raised, but could not be reduced during 1893, but might thereafter upon notice. To say that he could only be dismissed at the end of a year would make this provision meaningless, for nobody contends that, without it, the contract might not be changed or even terminated at any yearly period by either party. The only reasonable construction is that, for the year 1893, the plaintiff had a right to a salary of \$1,200. After that, his right might be terminated upon notice, which was equivalent to saying that the defendant might terminate the contract, because he could not be compelled to work at a lower price, or insist upon receiving any stated amount." *Fuller v. Peninsular White Lead & Color Works*, 111 Mich 221, 69 NW 492.

Regard should also be had to the precise terminology used by the parties in expressing the employment agreement. Thus the customary terms "at rate of" or "upon basis of" may assume varying significance according to the facts in each case. See cases collected in 100 ALR 848.

It is held that where an employee is hired under an arrangement which does not specify the term of employment, but the yearly salary, "and expenses when away from home; salary payable on demand when earned," the hiring is on a yearly basis. *Southwell v. Parker Plow Co.* 234 Mich 292, 207 NW 872.

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ENCROACHMENT UPON PROPERTY, MANDATORY INJUNCTION

Q—What is your occupation? A—I am a licensed surveyor and civil engineer.

Q—How long have you been engaged in this work?

Q—Did you, on or about June 6th, 1943, receive a request from the plaintiff for a survey of his property located at 567 Wilson Avenue, in this city? A—Yes.

Q—Did you thereafter visit this property and make certain observations? A—I did.

Q—Did you stake out the boundary lines of the plaintiff's property? A—I did.

Q—And based upon these measurements and observations you made a survey? A—Yes.

Q—I show you a survey and ask if that is the survey you refer to? A—Yes.

(Offered in evidence.)

Q—To what scale is this survey drawn? A—Five feet to each inch.

(Explain all markings, lines, etc.)

Q—I show you a photograph and ask if it correctly represents the appearance of this property as you saw it on that day? A—It does.

(Offered in evidence.)

Q—Looking at this photograph, and comparing it with the survey, can you point out any landmarks indicating the western boundary of the plaintiff's property? A—Yes, the two telephone poles, etc.

Q—Please describe the character of the structure shown on this photograph as being on or near the western boundary line? A—It is a concrete wall.

Q—Are you able to state from your measurements and this survey based thereon whether this concrete wall extends over the plaintiff's western boundary line? A—Yes.

Q—Will you so state? A—It extends two feet over the line, etc.

Q—Describe the character of the shadings shown here on the photograph immediately adjoining the wall, and upon the plaintiff's property? A—They are holes or depres-

sions in the subsoil, all of which are partly filled with jagged concrete extensions of the wall, etc.

(The character of the encroachment should not be left to the imagination; it should be fully described by oral testimony and documentary proof.

The rule is well settled that a mandatory injunction is the proper remedy for a landowner to invoke against an adjoining landowner for the purpose of compelling the removal of structures which encroach upon the plaintiff's property. *Jobst v. Mayer*, 327 Ill 423, 158 NE 745; *Marcus v. Brody*, 254 Mass 152, 149 NE 673; *Krich v. Zemel*, 96 NJ Eq 208, 124 A 449; *Fisher v. Goodman*, 205 Wis 286, 237 NW 93.

The essence of an injury in cases of this character rests largely within the discretion of the trial court and depends upon the surrounding facts and circumstances. *Jobst v. Mayer*, 327 Ill 423, 158 NE 745; *Marcus v. Brody*, 254 Mass 152, 149 NE 673; *Krich v. Zemel*, 96 NJ Eq 208, 124 A 449; *Fisher v. Goodman*, 205 Wis 286, 237 NW 93.

A summary of the rule in this respect is well stated in the following observation by one court:

"The protection by injunction of property rights against continuing trespasses by encroaching structures has sometimes been based upon the danger that a continuance of the wrong may ripen into title by adverse possession or a right of prescription. Other cases point out that, since trespassing structures constitute a nuisance, and a plaintiff obtaining a second judgment for nuisance has a right to have the nuisance abated by warrant of the court, the denial of an injunction would only drive the plaintiff to a more dilatory remedy to obtain removal or abatement. But the basic reason lies deeper. It is the same reason which lies at the foundation of the jurisdiction for decreeing specific performance of contracts for the sale of real estate. A particular piece of real estate cannot be replaced by any sum of money, however large; and one who wants a particular estate for a specific use, if deprived of his rights, cannot be said to receive an exact equivalent or complete indemnity by the payment of a sum of money. A title to real estate, therefore, will be protected in a court of equity by a decree which will preserve to the owner the property itself, instead of a sum of money which represents its

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value. Leaving an aggrieved landowner to remove a trespassing structure at his own expense and risk would amount in practice to a denial of all remedy, except damages, in most cases. If the landowner should attempt to right his own wrongs, a breach of the peace would be likely to result.

The facts that the aggrieved owner suffers little or no damage from the trespass, that the wrongdoer acted in good faith and would be put to disproportionate expense by removal of the trespassing structures, and that neighborly conduct as well as business judgment would require acceptance of compensation in money for the land appropriated, are ordinarily no reasons for denying an injunction. Rights in real property cannot ordinarily be taken from the owner at a valuation, except under the power of eminent domain. Only when there is some estoppel or laches on the part of the plaintiff, or a refusal on his part to consent to acts necessary to the removal or abatement which he demands, will an injunction ordinarily be refused." *Geragosian v. Union Realty Co.* 193 NE 726 (Mass).

The injunction may be refused because of circumstances which make its issuance unfair or inequitable under the circumstances of the case. *Geragosian v. Union Realty Co.* 193 NE 726 (Mass).

The Court has for example denied a mandatory injunction upon the ground that the encroachment was the result of a mistake, or that the damage to the plaintiff was trivial, and the cost of removing the encroachment altogether or of proportion to the damage caused the plaintiff. *Blackfield v. Thomas Allec Corp.* 128 Cal App 348, 17 P(2d) 165; *Case v. Sisich*, 97 Cal App 106, 275 P 492.

In one instance a mandatory injunction for the removal of an overhanging wall was denied upon the ground that the encroachment was very slight and the result of an honest mistake. *Case v. Sisich*, 97 Cal App 106, 275 P 492.

It would appear that the cost of removal may prove a decisive factor in cases of the character under discussion. *Blackfield v. Thomas Allec Corp.* 128 Cal App 348, 17 P(2d) 165; *Case v. Sisich*, 97 Cal App 106, 275 P 492; *Marcus v. Brody*, 254 Mass 152, 149 NE 673.

"Injunctive relief may impose upon the defendant an expense out of proportion to the apparent benefit to the plain-

tiff, but this is not enough to deprive her of the right to an injunction. The defendant cannot appropriate to his use, against her will, his neighbor's property; he cannot deprive her of the enjoyment, possession, and title to her land; and she will not be compelled to part with it at a valuation, even though it would be much cheaper for the defendant to pay the damages than to restore the property." *Marcus v. Brody*, 254 Mass 152, 149 NE 673.

ESCROW AGREEMENT, ACTION TO ENFORCE

Recourse may be had to equity to compel delivery of an instrument placed in escrow, where it can be shown that performance of the condition stipulated, or the event agreed upon, has occurred. *Brown v. Stutson*, 100 Mich 574, 59 NW 238, 43 Am St Rep 462.

An escrow may be defined as a written instrument which creates a legal obligation, and which is deposited by the grantor or promisor with a third party to be kept by the depository until the performance of a condition or the happening of a certain event, upon which occurrence the instrument, or property held thereunder, is to be delivered to the grantee or promisee. Under this rule, a wide variety of instruments may be involved, including the common transaction involving deeds.

Actions at law may also be maintained to recover money damages for the unlawful retention of property held in escrow, in addition to the equitable remedies.

Thus, where stock has been placed in escrow, it has been held that upon refusal to comply with a demand for the return thereof, after performance of the conditions stipulated, the party entitled to the same may maintain an action in conversion; the damages in such case being the value of the stock with legal interest from the time of the conversion. Annotation: 95 ALR 296.

Similarly, actions at law may be maintained against depositaries for damages resulting from failure to deliver a deed, or for wrongfully withholding, after due demand, money to which the claimant is lawfully entitled. Annotation: 95 ALR 296.

Parol evidence may be introduced to show the conditions under which the instrument or property was delivered in escrow, and such matters as the time of delivery, manner or method of delivery, or even that an escrow in fact took place at the time of the delivery. *Wendlinger v. Smith*, 75 Va 309, 40 Am Rep 727.

This rule prevails notwithstanding the prohibitions of the parol evidence rule. *Manning v. Foster*, 49 Wash 541, 96 Pac 233, 18 LRA(NS) 337.

**EXCAVATION, LIABILITY TO ADJOINING
LANDOWNER**

Q—You are the plaintiff in this action?

Q—Are you the owner of property located at 897 West Avenue?

Q—Were you the owner of this property on May 21st, 1943?

Q—Please describe the character of your property. A—It is a lot 40 x 140, with a two-story brick residential building.

Q—I show you a photograph, and ask if it is a true and accurate reproduction of your building on that date? A—Yes.

(Marked in evidence.)

Q—Are there any buildings upon the adjoining properties? A—No.

Q—Were there any buildings upon the adjoining properties on May 21st, 1943? A—No.

Q—Now tell this court and jury, what if anything, you noticed about the condition of the lot immediately south of your property on this date? A—I saw a large steam shovel digging out the ground, etc.

(Describe the extent and character of the digging.)

Q—For how long a period of time did this excavating work continue?

Q—How large a portion of the lot was dug out?

Q—I show you a photograph and ask if it fairly and accurately represents the appearance of this lot at the completion of the excavating work? A—Yes.

(Marked in evidence.)

Q—How far is the nearest portion of the hole to your house?

Q—How far is the nearest portion to your building line?

Q—Did you receive any notice of the commencement of the excavating work? A—No.

Q—When was the last date that you observed men working about the excavation? A—June 1st, 1943.

Q—Since that date what changes, if any, have taken place in the excavation? A—It has filled with debris, etc.

(An excavation that is allowed to remain for an unreasonable

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length of time, collecting water, ice, etc. and thereby weakening adjoining structures, may impose liability. See text.)

(The damage to the plaintiff's property should be described in detail.)

The rule is generally affirmed that a landowner who excavates upon his own land is not liable for damage thereby resulting to buildings on the adjoining land, upon the broad theory that the right of a property owner to the lateral support of the soil of adjoining landowners does not extend to buildings upon his land. *Scranton Coal Co. v. Graff Furnace Co.* 289 Fed 305; *Sullivan v. Zeiner*, 98 Cal 346, 33 Pac 209, 20 LRA 730; *Canfield Rubber Co. v. Leary*, 99 Conn 40, 121 Atl 283; *Best Mfg. Co. v. Peoria Creamery Co.* 226 Ill App 60, affirmed 307 Ill 238, 138 NE 684; *Starrett v. Baudler*, 181 Iowa 965, 165 NW 216; *Finegan v. Eckerson*, 32 App Div 233, 52 NY Supp 993.

In explanation of the theory underlying this rule, one court pointed out that a contrary rule "would put it in the power of a lot owner, by erecting heavy buildings on his lot, to greatly abridge the right of his neighbor to use his lot. It would make the rights of the prior occupant greatly superior to those of the latter." *Northern Transp. Co. v. Chicago*, 99 US 635, 25 L ed 336.

It does not follow from this rule that an excavating landowner owes no duty to adjoining landowners. He is under a duty to use reasonable care, and what constitutes the exercise of reasonable care will depend upon the circumstances of each case. *Canfield Rubber Co. v. Leary*, 99 Conn 40, 121 Atl 283.

In one instance it was pointed out that the "duty on the part of the excavator, as regards buildings on adjacent land, when no right of lateral support therefor has been acquired, results from the relative rights of the parties and legal principles governing conduct. As an adjacent owner has no right of support for his buildings, he has no property right in the form or nature of an easement in his neighbor's lands. If, therefore, the latter remove a part of his land so as to endanger the building of the former, he destroys no property right,—takes away nothing that belongs to the former. It does not follow, however, that he owes him no duty in the premises. Though he has complete dominion and power over

his own land, and may do with it what he pleases, he is nevertheless bound, . . . to use his property in such a manner as not to injure his neighbor's. This gives the latter no property right in the land of the former. It merely gives a personal right against him. It places a restraint upon his conduct. For any lawful purpose, he may use his property, but he must use it in a lawful, that is, careful, manner. In other words, he must execute the work, as far as is reasonably practicable, and not unduly burdensome, with a view to the safety of the buildings on the adjacent property. But for this rule, he might go at any hour of the day or night, without having given any notice to the adjoining owner indicating when, how, or to what extent, he intended to alter the condition of his property, and make an excavation for a cellar along the entire wall of a heavy, valuable building, knowing it would fall in consequence thereof, and yet intending to replace, the earth removed by a wall. He would be under no duty to vary the mode or manner of his work in the slightest degree, in respect to the time thereof or otherwise, in the interests of the safety of the building. Having thus made the excavation, he could build his wall at his leisure, and would be under no duty to prosecute the work diligently, even though it should be apparent that delay in this part of the work would endanger the building. Such conduct would be reckless, careless, and wanton, in view of the ease with which the mode of work could be varied, in respect to time and manner, and previous notice given of the intentions to alter the condition of the property, the extent of the alteration, the manner in which it is to be done, and the time, so as to afford the owner of the building an opportunity to take such measures for its protection as he might see fit to adopt. The rule requiring care is not based upon any right of property in adjacent land for support of buildings or otherwise. It is simply a restraint upon reckless and unnecessary conduct in respect to the use of such adjacent property, fraught with danger to the building."

The theory behind the rule is well expressed as follows: "It may be well to point out distinctly that the rule which the cases lay down does not make the excavator, an adjoining landowner, an insurer of his neighbor's buildings. It goes no further than to require him to exercise a reasonable degree of skill and care to avoid injuring them; and it seems that

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such a rule is necessary in order to secure to every landowner the fullest possible enjoyment of his rights to improve his own property. Courts, and in some jurisdictions legislators, have recognized that as land becomes valuable for building purposes, the common-law rule of property denying any right of lateral support to buildings cannot be carried to the point of licensing the adjoining owner to excavate regardless of the consequences to his neighbor's buildings, without, in effect, depriving the latter of his property right of building up to the dividing line, or, as in this case up to the highway line. It is no longer possible under modern urban conditions to say that an owner who builds to the line does so at his peril; and, on the other hand, it is not possible to say that his neighbor shall not thereafter excavate near the adjoining buildings except at his peril. Between equal and conflicting property rights, a compromise has been effected by the rule in question, and, in applying it, its purpose should be kept in view; to wit, to secure to each of the adjoining owners in equal measure the fullest possible enjoyment of his property rights. The duty of furnishing or maintaining lateral support to the adjoining soil in its natural state is an absolute one, and arises out of ownership, or permanent or temporary control, of adjoining land, and this duty may introduce a complicating factor into the situation, even though the land is built upon. Laying aside that possibility, the qualified duty of temporarily maintaining or furnishing lateral support to soil burdened with buildings does not impose a servitude on the land or limit the owner's right to improve it at will. It does require him, in carrying out his improvements, to use reasonable care and skill, and to that extent it is a limitation on the manner in which he may perform the work of improving his land. It is of course impossible to define in advance what will constitute reasonable care in a given case; but the authorities seem to justify the following general observations:

"The excavating owner is required, in the first place, to use reasonable care to find out in advance, or as the work progresses, whether it is liable to cause damage to his neighbor's building; and, if so, to notify the owner in time to give him an opportunity to protect the building against damages which cannot be wholly averted by the exercise of reasonable care in the performance of the work. Reasonable care in the per-

formance of the work will generally require no more than the adoption of commonly used and approved methods of preventing the adjoining soil burdened with buildings from moving into or toward the excavation. After due notice, the owner of the building must protect himself against risks caused by its additional weight upon the soil, which cannot be averted by such methods." *Canfield Rubber Co. v. Leary*, 99 Conn 40, 121 Atl 283.

Failure to adopt reasonable precautions in excavating upon property, resulting in injury to the land or structure of an adjoining property owner, will impose liability for the damages flowing therefrom. *Jamison v. Myrtle Lodge*, 158 Iowa 264, 139 NW 547; *Jones v. Hacker*, 104 Kan 187, 178 Pac 424; *Craig v. Kansas City Terminal Co.* 271 Mo 516, 197 SW 141.

As stated: "(1) While a landowner has the undoubted right to excavate close to the boundary line, he must take reasonable precautions to prevent his neighbor's soil from falling.

"(2) If he has taken such reasonable precautions, and yet the soil falls from its own pressure, he is still liable for the injury to the land, but not for any injury to the superstructure.

"(3) If the pressure of the superstructure causes the land to fall, he is not liable either for injury to the land or superstructure.

"(4) If he fails to take such reasonable precautions to protect his neighbor's soil, and to preserve it in its natural state, he is liable for the injury to both the land and the superstructure, if the pressure of the superstructure did not cause the land to fall, and it fell in consequence of the failure to take such reasonable precautions." *Bissell v. Ford*, 176 Mich 64, 141 NW 860.

In *Hanrahan v. Baltimore*, 114 Md 517, 80 Atl 312, it was pointed out: "It is true that the right of lateral support only extends to the soil in its natural condition, and does not protect buildings adding weight to the land, but the erection of buildings does not destroy the pre-existing right of support to the soil itself. In such cases there is no right of action for unavoidable injury not caused by negligence or unskillfulness, and which would not have occurred if there were no building on the land. But negligence resulting in injury gives a cause of action, whether the land is built on or not."

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In another case, it was pointed out that the rule applicable to cases of this character is that "when land is not in its natural condition, but has a building thereon, the right of lateral support, without regard to negligence, does not extend to the increased weight of the building; and for the removal of such support, without negligence, but with ordinary prudence and care, defendant would not be liable. But, if the defendant, in making excavation on his lot, endangered the support of the building occupied by plaintiff on the adjacent lot, and did not exercise reasonable prudence and care to avoid such danger, but made his excavation in a 'wrongful, careless, and negligent manner,' thereby causing injury to plaintiff's property, defendant would be liable." *Weiss v. Kohlhausen*, 58 Or 144, 113 Pac 46.

The law does not presume negligence in the manner of planning or performing an excavation, but requires the party alleging same to present sufficient proof to support the allegation. *Jamison v. Myrtle*, 158 Iowa 264, 139 NW 547.

The excavator is not under a duty to take all possible precautions against damage to adjoining property, but is required to use such care and diligence as is consistent with the dictates of reasonable care under the circumstances of the case. *Jamison v. Myrtle*, 158 Iowa 264, 139 NW 547; *Bergen v. Morton Amusement Co.* 95 Misc 647, 159 NY Supp 935.

A question of fact is generally presented for the determination of the jury as to what constitutes reasonable care under the existing circumstances. *Scranton Coal Co. v. Graff Furnace Co.* 289 Fed 305; *Quincy v. Jones*, 76 Ill 231, 20 Am Rep 243.

Under some circumstances, a duty may exist on the part of the excavating landowner to notify an adjoining landowner of proposed excavating operations. *Beard v. Murphy*, 37 Vt 99, 86 Am Dec 693; *Knapp v. Siegley*, 120 Wash 478, 208 Pac 13; *Walker v. Strosnider*, 67 W Va 39, 67 SE 1087.

"Where the danger of loss in doing a legal act is not equally balanced, we should lean to that side which most needs protection. Here a mere notice, which can cause but little trouble to one who is honestly exercising his right of excavating his land next to his neighbor's house, may enable the receiver of notice to shore or prop his wall to prevent its falling, or it may

lead to some arrangement by which neither will be injured. It is more than a mere neighborly courtesy to give such notice, because it involves the right of one man to assert his right regardless of the injury he may cause to his neighbor without such warning. The manner of giving notice may be only such as is reasonable under the circumstances, either to the owner of the property, or, if there be difficulty in finding or serving it on him, then it may be given to the tenant or occupant who is interested in protecting the property." *Schultz v. Byers*, 53 NJL 442, 22 Atl 514.

In another instance, it was pointed out that where "a lot owner has added to the weight of the soil by the erection of a building, he must himself provide proper support and care for such additional load whenever the owner of the adjoining lot wishes to excavate thereon; but reasonable notice of the intention to excavate on such adjoining lot so near the building that danger thereto might reasonably be anticipated must be given to the owner of the building so that he may have an opportunity to protect and support it." *Hickman v. Wellauer*, 169 Wis 18, 171 NW 635.

Knowledge on the part of an adjoining landowner that excavating work was being carried on may not be sufficient under the circumstances of the case to dispense with notice on the part of the landowner performing the excavation. *Smith v. Howard*, 201 Ky 249, 256 SW 402.

"It is conceded in this case that no notice was given, but defendants rely upon the knowledge the plaintiff had of the work. Manifestly such knowledge, to be available as a defense to defendants, must have been such as a lawful notice would have imputed to the plaintiff. The mere fact that he knew the work was going on was in itself insufficient; manifestly he must have known, also, not only the proximity of the excavation to his own property, and the extent thereof on the surface as proposed, but he must have known the depth, particularly along or near to his own property line, in order to determine the necessity for precautionary measures on his part. On its face a shallow excavation on an adjoining lot, near another's property line, would not involve the same danger to the lateral support to which his property in its natural condition is entitled, as would a much deeper excavation at the same point." *Smith v. Howard*, 201 Ky 249, 256 SW 402.

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The question as to the need for notice, or the sufficiency of a notice already given, is one of fact for the jury to determine in the light of all the surrounding facts and circumstances. *Moore v. Anderson*, 5 Boyce(Del) 479. 94 Atl 771.

"The negligence on which the plaintiff relies is the adoption by the defendant of a plan for his building, which called for a certain depth of excavation, and the failure of the defendant to give the notice which the depth of the excavation shown on the plans required. If the independent contractor had made the excavation in the most approved manner, and without negligence on his part, the defendant would still have been liable to the plaintiff for the damages resulting from the excavation because of his failure to give the notice which was required by the plan adopted. This duty was an absolute one. It could not be delegated. The employment of an independent contractor afforded the defendant no avenue of escape for his failure to give the proper notice to the plaintiff. The trial court made no error in its refusal to direct on this ground a verdict for the defendant." *Newman v. Pasternack*, 135 Atl 877(NJ), 50 ALR 485.

The length of time required for performing an excavation may prove determinative of the issue of negligence or lack of reasonable care. *Bohrer v. Dienhart Harness Co.* 19 Ind App 489, 49 NE 296.

Thus, it has been held that maintaining an excavation for a period of three years, allowing snow, ice and water to accumulate therein, to the damage of a building upon the adjoining property, may constitute negligence. *Garvy v. Coughlin*, 92 Ill App 582; *Bohrer v. Dienhart Harness Co.* 19 Ind App 489, 49 NE 296.

A party that excavates without exercising proper precautions may not set up as a defense the weakened condition of the structures upon adjoining premises; or stated differently, the fact that the building of an adjoining landowner is in a defective condition, and thereby sustains damage, will not relieve the party making the excavation from liability for acts of negligence. *Shafer v. Wilson*, 44 Md 268; *Walker v. Strosnider*, 67 W Va 39, 67 SE 1087.

"As the condition of the injured building often injects other questions into cases of this kind, and is relied upon here as matter of defense, we observe that defectiveness or weakness

in it does not justify negligence or reckless conduct on the part of the adjoining owner, in altering the condition of his property, or excuse him from liability for injury occasioned thereby. He is governed by the condition of the building as he finds it, and must conduct his operations accordingly, for these conditions have been previously and rightfully made. To hold otherwise would give one adjacent owner the power to determine what sort of a building his neighbor should erect or in what state of repair he should keep it. Defects in the building may be such as to contribute to its injury in case of the removal of the adjacent earth, but the act of constructing it in an unskilful manner, or allowing it to become defective, would not be the proximate cause of the injury, if it could be deemed negligence. There would be two causes of injury in such case, but the negligence of the excavator, in failing to take reasonable precaution for the safety of the building, however defective it might be, would be the last cause of injury, the nearest in time and, therefore, the proximate cause. Defectiveness of the injured building may mitigate the damages, but it does not bar an action for the injury." Walker v. Strosnider, 67 W Va 39, 67 SE 1087.

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FALSE ARREST, ACTION AGAINST EMPLOYER

(Action by patron of store against owners for false arrest and detention by store detective)

- Q—You are the plaintiff in this action?
- Q—Were you in the Hay-Adams Department Store on Main Street during the morning of May 3rd, 1942?
- Q—What were you doing there at that time? A—I came to purchase a pair of shoes.
- Q—Did you make that purchase?
- Q—About what time of the day did you make this purchase?
- Q—Do you recall who waited on you?
- Q—What conversation, if any, took place between you and the saleslady at the time you bought the shoes? A—She asked me to take the shoes to another department in the store for slight alterations.
- Q—Did you comply with that request?
- Q—What, if anything, happened to you while you were on your way to have your shoes altered? A—A man who said he was the store detective stopped me, etc.
- Q—Were you detained?
- Q—How long were you detained?
(Show circumstances of detention, nature of protests made by plaintiff, her appearance at time of detention, and any other factors tending to show defendant's agent acted without sufficient basis or excuse.)
- Q—Would you recognize this man if you saw him again?
- Q—Do you see him in the courtroom?
(Possible line of questioning for defendant in examination of its employee.)
- Q—You are employed by the Hay-Adams Store?
- Q—Were you in such employ on May 3rd, 1942?
- Q—Did you have occasion to observe the plaintiff in this store on that day?
- Q—Will you please tell this court and jury the circumstances under which you saw the plaintiff? A—She was walking rapidly from one side of the store to the other, carrying a package under her coat, etc.
- Q—Did you stop the plaintiff?

Q—Did you request her to show you what she was carrying?

A—Yes, and she refused.

Q—Did you inform her of your position in the store, and your duties?

(Any facts tending to justify the conduct of the defendant's agent should be fully clarified.)

Damages may be recovered against a master or employer, whether an individual or private corporation, for acts of an employee without the scope of his employment, which result in the unlawful arrest of a person. There is obviously no question about liability where the employee acts at the express request of the employer. But such express request is not essential; it is sufficient to show that the employer made it the duty of the agent or servant to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. *Tutwiler Operating Co. v. Evans*, 208 Ala 252, 94 So 120; *Dobbins v. Little Rock, etc. R. Co.* 79 Ark 85, 95 SW 794, 9 Ann Cas 84; *Korkman v. Hanlon Dry Dock, etc. Co.* 53 Cal App 147, 199 Pac 880; *Chicago, etc. R. Co. v. Gwin*, 125 Ill App 456; *Ayres v. Harmon*, 56 Ind App 436, 104 NE 315; *Whitman v. Atchison, etc. R. Co.* 85 Kan 150, 116 Pac 234, 34 LRA(NS) 1029; *Louisville etc. R. Co. v. Owens*, 164 Ky 557, 175 SW 1039; *Pearson v. Great Southern Lumber Co.* 134 La 117, 63 So 759, LRA1916F 1249; *New York, etc. R. Co. v. Waldron*, 116 Md 441, 82 Atl 709, 39 LRA(NS) 502; *Jacques v. Childs Dining Hall*, 244 Mass 438, 138 NE 843, 26 ALR 1329; *Dupre v. Childs*, 52 App Div 306, 65 NY Supp 179; Annotation: 35 ALR 645.

It was held in *Parke v. Fellman*, 130 NY Supp 361, 145 App Div 836, that where a special officer of the defendant corporation, employed to preserve order on the station platform, wrongfully arrested a passenger at the instigation of a private citizen, and the evidence clearly showed that there had been no ground whatever for the charge against the plaintiff, and that he had been guilty of no act constituting legal misconduct, such officer was acting in the regular course of his duty in making the arrest, and the railroad company was liable.

The proprietor of a department store is liable where a floor-

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walker unlawfully restrains a customer by force, charging her with having stolen a pair of shoes, it appearing that a clerk in the shoe department had given such customer permission to take the shoes across the store to another department. *Efroymsen v. Smith*, 29 Ind App 451, 63 NE 328.

The authority of the servant or employee may be implied from the nature of his relation to the employer, the extent and scope of his authority, the nature of the duties he performs, and the degree of discretion reposed in him by his immediate superior. *Robinson v. Greene*, 148 Ala 434, 43 So 797.

It was held in *Dugan v. Baltimore, etc. R. Co.* 159 Pa 248, 28 Atl 182, 39 Am St Rep that if general authority of a detective employed by a railroad company included, expressly or by general usage and consent, the power to make an arrest in behalf of the company, the fact that he made an arrest without a warrant is immaterial, and the company is liable therefor.

The proof upon the question of scope of authority should be clear and explicit, and sufficient to make it appear that the false arrest was caused by an agent acting within the scope of his employment. *Dickinson v. Muse*, 135 Ark 76, 204 SW 609.

The question whether the servant acted within the scope of his employment at the time of the acts complained of, is a question for the jury to decide in the light of the facts presented. *Taylor v. New York, etc. R. Co.* 80 NJL 282, 78 Atl 169, 39 LRA(NS) 122.

The general manager of a hotel who authorizes or ratifies a wrongful arrest has been held a principal, whose acts with respect to the operation of the hotel and the conduct of the business are the direct acts of the corporation itself. *Hotel Tutwiler Operating Co. v. Evans*, 208 Ala 252, 94 So 120.

The employer may, of course, show in justification that the servant or employee committing the act of false imprisonment could not have been held liable under the law, and not responsible in damages; in which event the master is not liable. Annotation: 35 ALR 652.

Thus, an employer is not liable for the false arrest by a detective in its employ of a patron where the latter's appearance and behaviour justified the belief that he had committed, or was about to commit, a felony. *St. Louis & S. F. R. Co. v.*

Wyatt, 84 Ark 193, 105 SW 72; *Newman v. New York*, L. E. & W. R. Co. 54 Hun 335, 7 NY Supp 560.

A stricter rule has been applied by some decisions in the case of an illegal detention of a passenger upon a common carrier, to the extent that the carrier has been held liable notwithstanding the servant acted outside the scope of his authority. *Moore v. Louisiana etc. R. Co.* 99 Ark 233, 137 SW 826; *Atchison etc. R. Co. v. Kenry*, 55 Kan 715, 41 Pac 252, 29 LRA 465; *Elliott v. Philadelphia, etc. Co.* 83 NJL 625, 83 Atl 899; *McLeod v. New York, etc. R. Co.* 76 NY Supp 347, 72 App Div 116.

The false imprisonment of an innocent person on a charge of attempting to pass counterfeit money, which was procured by a railroad detective while acting within the scope of his authority, renders the railroad company liable, although he exceeded his authority and acted contrary to instructions respecting the caution to be exercised. *Eichengreen v. Louisville & N. R. Co.* 96 Tenn 229, 31 LRA 702, 54 Am St Rep 833, 34 SW 219.

The question sometimes arises as to the recovery of punitive or exemplary damages in actions against police officers for false imprisonment. The rule here is that where the good faith of the officer is established, he is not liable for such damages, notwithstanding he is still liable in compensatory damages. *Roberts v. Hackney*, 109 Ky 265, 58 SW 310, 59 SW 328; *Gross v. Rice*, 71 Me 241; *Stearns v. Oppenheim*, 146 App Div 651, 131 NY Supp 533; *Holmes v. Le Fors*, 36 Okla 729, 129 Pac 718; *Richardson v. Huston*, 10 SD 484, 74 NW 234; *Parker v. Roberts*, 131 Atl 21 (Vt) 49 ALR 1382; Annotation: 49 ALR 1386.

"A public officer who acts in the utmost good faith and fairness in the service of civil process which he believes to be valid cannot be mulcted in exemplary damages simply because it eventually turns out that such process was void; neither can he be thus punished, even though the plaintiff did not, in fact, have a just basis for the suit." *Parker v. Roberts*, *ibid*.

Thus, it has been held that in the absence of circumstances establishing malice by a sheriff making an arrest while enforcing the prohibition laws, punitive damages may not be allowed in an action for false imprisonment. *Holmes v. Le Fors*, 36 Okla 729, 129 Pac 718.

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Where lack of good faith is established, and the other elements of an action for false imprisonment are established, punitive or exemplary damages may be recovered against the officer, in those jurisdictions recognizing the right of recovery of punitive damages. *Roberts v. Hackney*, 109 Ky 265, 58 SW 310; *Gross v. Rice*, 71 Me 241; *Stearns v. Oppenheim*, 146 App Div 651, 131 NY Supp 533.

A circumstance indicative to some extent of malice and lack of good faith is the use of unnecessary force and violence, or the use of profane and threatening language.

But the malice essential to recovery of exemplary damages need not be grounded in any specific course of action, or necessarily involve the element of ill will; malice may be any act done intentionally, without just cause or reasonable excuse. *Beardsley v. Soper*, 184 App Div 399, 171 NY Supp 1043.

The proof in the case should make clear such factors as the nature and extent of authority in the person committing the act alleged to constitute false imprisonment, the reason for the presence of the plaintiff upon the premises, and the nature of the acts alleged to constitute provocation for the arrest or imprisonment.

The events immediately leading up to the acts constituting the false imprisonment should be fully described at the trial, in order to prove, or disprove, the claim of arrest without sufficient cause and upon no more than mere suspicion.

"'Suspicion' implies a belief or opinion as to guilt, based upon facts or circumstances which do not amount to proof. The test of the sufficiency of the facts and circumstances to justify the arrest is whether they were such as would actuate a man of ordinary reason and prudence in the officer's situation, acting in good faith in the discharge of the officer's duties." *Bushardt v. United Investment Co.* 121 SC 324, 113 SE 637, 35 ALR 637.

GARAGE-KEEPER, LIABILITY TO CAR OWNER

Q—You are the plaintiff in this action?

Q—Are you the owner of a motor vehicle bearing 1943 New York State Registration 6B-768?

Q—Did you, on or about the 7th day of April, 1943, have any conversation with the defendant in this action regarding the storage of your car in his garage? A—I did.

Q—Do you recall the exact date of this conversation?

Q—Now will you tell us the substance of this conversation, as near as you can recall.

(It is essential to show the full character and extent of the relationship between the parties, the amount to be paid, nature of care or service to be rendered, etc.)

Q—Did you thereafter deliver your car to the defendant's garage?

Q—On what date did you deliver your car to the defendant?

Q—Did you make any payments to the defendant for storage of your car?

Q—In what amounts, and upon what dates?

Q—Did you thereafter, and on or about the 14th day of April, 1943, make demand for the return of your car?

Q—Upon whom did you make this demand, and under what circumstances?

Q—Did you receive your car?

(Upon proof by the defendant that his inability to deliver the vehicle is due to factors over which he had no control, or in the operation of which he played no part, the plaintiff must sustain his burden of proof by further evidence of circumstances indicating lack of care in the defendant. See text.)

Proof of negligence in safeguarding of car

Q—Are you the owner of a motor vehicle?

Q—Where did you store this car during the month of April, 1943? A—In the Smith Garage on Main Street.

Q—For how long a period of time have you been storing your car at this garage?

Q—Did you have occasion to visit this garage in delivering, or calling for, your car? A—I did.

Q—Are you acquainted with the plaintiff in this action?

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- Q—Are you further acquainted with the car belonging to the plaintiff on or about April 7th, 1943?
- Q—Will you please describe this car, as near as you can recall.
- Q—Did you notice this car in the garage of the defendant at any time during the week following April 7th, 1943? A—I did.
- Q—Will you please describe the location of this car? A—I saw it on two occasions parked in an empty lot next to the garage, etc.
- (Proof of specific acts of negligence or lack of care in the custody of the vehicle may be shown by disinterested witnesses.)
-

The decisions are generally agreed that a garage-keeper is under a duty to exercise reasonable care in the safeguarding of motor vehicles left in their custody, and that for a failure to use such care, amounting to negligence, he may be held liable for loss of, or damage to, such cars. *Southern Garage Co. v. Brown*, 187 Ala 484, 65 So 400; *Morgan Millwork Co. v. Dover Garage Co.* 7 Boyce (Del) 383, 108 Atl 62; *Roberts v. Kinley*, 89 Kan 885, 132 Pac 1180, 45 LRA(NS) 938; *Beck v. Wilkins-Ricks Co.* 179 NC 231, 102 SE 313. See also cases collected in 15 ALR 682.

The precise degree of care required, and the character of the measures for safeguarding that must be taken by the garage-keeper, obviously depend upon the facts and circumstances of each case; but in no event is the garage-keeper an insurer of the safety of cars entrusted to his care. *Beck v. Wilkins-Ricks Co.* 179 NC 231, 102 SE 313.

“When it accepted the property, the Fulton Motor Car Company was bound to bestow upon it ordinary diligence, such as every man of common prudence takes of his own property. As the contract was for the mutual benefit of the parties, the defendant was only liable for loss occurring by reason of its negligence, and was not liable for loss due to accident or irresistible force. It was answerable only for ordinary neglect. If the machine was lost or damaged for want of ordinary care and diligence, the defendant is, of course, responsible. When called upon for the return of the car, it was the duty of the defendant to deliver it to its owner, or account for its default by showing a loss by some violence, theft, or accident. It

seems to me in this case that when the evidence disclosed the fact that this car was lost by fire, or, in other words, its loss was accounted for, the burden continued upon the plaintiff to show that its loss was occasioned by some negligence or want of ordinary care upon the part of the defendant." *Allen v. Fulton Motor Car Co.* 128 NY Supp 419, 71 Misc 190.

The question of negligence in the care and custody of the vehicle entrusted to the care of a garage-keeper must be decided in the light of the facts of each case, with special reference to the type of garage involved, the character and extent of care contracted for, local customs and usages understood by both parties, and any other factors explanatory of the proper degree of care to be exercised under the circumstances. *Thomas v. Hackney*, 192 Ala 27, 68 So 296; *Southern Garage Co. v. Brown*, 187 Ala 484, 65 So 400; *Morgan Millwork Co. v. Dover Garage Co.* 7 Boyce (Del) 383, 108 Atl 62; *Roberts v. Kinley*, 89 Kan 885, 132 Pac 1180, 45 LRA (NS) 938; *Allen v. Fulton Motor Car Co.* 128 NY Supp 419, 71 Misc 190; *Beck v. Wilkins-Ricks Co.* 179 NC 231, 102 SE 313. See also cases collected in 15 ALR 682.

It is important in cases of this character to examine carefully into the nature of the relationship between the parties involved, and the type of bailment that resulted from such relationship. Where it appears that the garage-keeper is no more than a gratuitous bailee, some decisions hold that he is under a duty to exercise only slight care and diligence. *Thomas v. Hackney*, 192 Ala 27, 68 So 296.

Thus, it has been held that where a garage-keeper agrees to repair a motor vehicle without making any charge therefor, and during the course of his examination of the car for the purpose of determining what repairs to make, damage results to the vehicle, the garage-keeper is not liable, as he was no more than a gratuitous bailee, and exercised due care under the circumstances. *Glende v. Spraner*, 198 Ill App 584.

Upon proof by the bailor that he delivered his car to the garage-keeper, and after making due demand therefor, failed to receive same, a *prima facie* case is made out, thereby shifting to the bailee the burden of explanation. *Smith v. Economical Garage*, 176 NY Supp 479, 107 Misc 430; *Beck v. Wilkins-Ricks Co.* 179 NC 231, 102 SE 313.

"Proof that a motor car, when delivered to a garage-keep-

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er, was in good order, but, when called for a few days later, it was damaged, the water jacket having frozen and burst, makes out a prima facie case against the bailee, the garage-keeper. It then became the duty of the garage-keeper to rebut the prima facie case, by showing that he used due care as bailee." *Smith v. Economical Garage*, 176 NY Supp 479, 107 Misc 430.

In those cases where a garage-keeper undertakes to perform a repair job, he assumes the responsibility for the entire work, notwithstanding that portions of the work are done by other parties, and outside the garage premises. *Russell's Express v. Bray's Garage*, 94 Conn 520, 109 Atl 722.

In one case it was pointed out as follows: "It appears that defendant conducted a general repair garage. It did not do welding, but had what it believed a competent welder, to whom welding jobs were turned over. When a garage takes a repair job, and the contrary does not appear, so far as the customer is concerned, it undertakes for itself the whole job. Whether the garage does all the work is quite immaterial. Should the job require work to be done outside the capacity of its shop, as that of a carriage maker, painter, glass cutter, the garage gets the work done on its own account, being equally responsible to the customer whether the work is done by its immediate employees or by specialists in the different lines of work required to be done. The garage company necessarily does all its work by employees, and whether they are permanently employed or only for special jobs can make no difference." *Russell's Express v. Bray's Garage*, 94 Conn 520, 109 Atl 722.

A garage-keeper who agrees to deliver the car of a bailor upon demand, as by delivery of the vehicle each morning from the garage to the home of the car owner, is bound by the original contract or agreement entered into between the parties; a new agreement is not created upon each delivery of the vehicle, the relationship being a continuing one. *Banks v. Strong*, 197 Mich 544, 164 NW 398.

"Defendant urges that each time the machine was delivered to plaintiff's home from the garage, or from the garage to the home, constituted a new contract; and that, inasmuch as he was out of the business at the time of the accident, and the business was owned by Owen, he is not liable. We think the

trial court was correct in declining to accept this theory. There was no dispute as to what the contract was. It contemplated storage and extras which are incidental to garage service. Conveyance to and from the residence was an incident and a part of such service; it was an extra, charged to and paid for by the plaintiff. The contract relied upon, and to which defendant was a party, involved in its performance the doing of services such as were being performed when the car was injured." *Banks v. Strong*, 197 Mich 544, 164 NW 398.

**HUSBAND AND WIFE, ANNULMENT, CONCEALMENT
OF MENTAL CONDITION**

(For Questions, see next Section)

The authorities are not in harmony upon the question of concealment of a diseased mental condition as constituting grounds for annulment of a marriage. According to some authorities, the concealment of such a condition affords no ground for annulment on the ground of fraud. *Hamaker v. Hamaker*, 18 Ill 138, 65 Am Dec 705; *Cumington v. Belchertown*, 149 Mass 223, 21 NE 435.

This view finds expression in the following holding: "Concealment or deception by one of the parties as to defects of character, morality, chastity, habits and temper are not grounds for annulment. These are accidental qualities which do not constitute the basis for the marriage relation. Persons entering the marriage relation necessarily know that it is not a temporary matter, and they must consider and decide for themselves. They must take the responsibility of informing and satisfying themselves, by acquaintance and inquiry, as to such matters, before assuming the obligations of this extraordinary contractual relation." *Robertson v. Roth*, 204 NW 329 (Minn), 39 ALR 1342.

There is authority for the contrary view, holding that concealment of a defective or concealed mental condition will lay a sufficient basis on the theory of fraud for annulment of a marriage. *Gross v. Gross*, 96 Mo App 486, 70 SW 393; *Smith v. Smith*, 184 NY Supp 134, 112 Misc 371.

Thus, it is stated: "I can conceive of nothing which in its essence amounts to a greater fraud upon a woman than the lunacy, unknown at the time of marriage, of him with whom she made a marriage contract. The effect on her is no less than it would be had an actual fraud been perpetrated. No innocent person of sound mind would marry a person known to him or her to be insane. Here are all the earmarks of fraud, excepting only intent. There is a virtual, if not an actual, fraud." *Kirkpatrick v. Kirkpatrick*, 81 Neb 627, 116 NW 499.

"Plaintiff had a right not merely in *foro conscientiae*, but *juris et de juri*, to have such information, and the defendant purposely withholding information, of her own disease of brain or nervous system, and of her insensate brother, and of

her mentally deranged sister who was then in an asylum for the insane, was a concealment of material facts constituting, in my opinion, a sufficient fraud practised upon plaintiff to absolve him from the contract and warrant the annulment of his marriage to the defendant." *Smith v. Smith*, 184 NY Supp 134, 112 Misc 371.

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HUSBAND AND WIFE, ANNULMENT, VENEREAL DISEASE

- Q—You are the plaintiff in this action?
- Q—You are married to the defendant in this action?
- Q—On what date were you married to the defendant?
- Q—Where did this marriage take place?
- Q—For how long a period prior to that date did you know the defendant?
- Q—During that period, what conversations if any, did you have with the defendant respecting the condition of his health?
- Q—Will you please tell us the substance of these conversations.
- Q—On what date did they take place?
- Q—After your marriage, what conversations if any, did you have with your husband respecting the condition of his health?
- Q—On what dates did these conversations take place?
- Q—What, if anything, happened to your own health during the first two months of your marriage? A—I took ill and upon examination by a physician found I had a venereal disease, etc.
(Competent medical proof should establish the conditions alleged.)
- Q—Did you, to your own knowledge, ever experience the ill effects just described prior to your marriage?
- Q—When was the last physical examination you had prior to your marriage?
- Q—And where was this examination held?
(The results of such examination should be established by competent medical testimony.)
- Q—When was the first time you learned the defendant had syphilis?
- Q—What did you thereafter do?
(Continued cohabitation may approximate a condonation of the offense.)
- Q—Did you at any time thereafter have sexual relations with your husband?

Q—For how long a period did you thereafter continue to live with your husband?

The decisions are agreed that where a husband or wife is afflicted with a venereal disease, and continues to have sexual relations with the other, communicating the disease as a result thereof, the grounds exist for an annulment of the marriage. *Carbajal v. Fernandez*, 130 La 812, 58 So 581; *Darling v. Darling*, 181 Mo App 211, 167 SW 1166; *Abramowitz v. Abramowitz* (dicta) 140 NY Supp 275.

In commenting upon this ground for annulment, one court stated: "We do not see how it is possible to imagine more direct and palpable case of cruelty to a wife by a husband than this. It comes within not only the spirit, but the very letter, of our statute, which allows divorce 'when any husband shall have by cruel and barbarous treatment endangered his wife's life, or offered such indignities to her person as to render her condition intolerable and life burdensome, and thereby force her to withdraw from his house and family.' That the libellant in this case was kept in a constant state of suffering from malignant venereal disease was proved without contradiction. It was equally well established that so long as cohabitation continued the disease would continue, and that this condition was always dangerous, especially during pregnancy, and in the case of childbirth might prove fatal." *McMahan v. McMahan*, 186 Pa 485, 40 Atl 795.

The act of continuing sexual relations with a spouse while contaminated with a venereal disease has been stated to constitute extreme cruelty in some jurisdictions, or extreme and abusive treatment, justifying a divorce as well as annulment. *Leach v. Leach*, 8 Atl 349 (NJ); *Canfield v. Canfield*, 34 Mich 519.

"A man may, as a result of his own debauchery, become so diseased as that living and cohabiting with him will probably destroy the health of his wife; and we are not prepared to say that such fact would not, of itself, entitle a pure and innocent woman to a divorce, in the absence of specific proof that he had communicated to her a loathsome disease." *Hanna v. Hanna*, 3 Tex Civ App 51, 21 SW 720.

A condition of syphilis may be grounds for an annulment on the theory of constituting impotence, or physical inca-

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capacity to discharge the obligations of the marital state. *Ryder v. Ryder*, 66 Vt 158, 44 Am St Rep 833.

It is also stated that the deliberate concealment of a condition of venereal disease constitutes a fraud of such character as will warrant an annulment. *Crane v. Crane*, 62 N.J Eq 21, 49 Atl 734; *Meyer v. Meyer*, 49 How. Pr. (NY) 311.

As has been stated in this connection: "Where a person, to his knowledge afflicted with a most grievous venereal disease, contagious in a very high degree, and which, even under the most favorable circumstances, requires years before it yields to treatment, and may even then for a long time still lurk in the system, a source of hidden danger, marries an innocent girl, under representations that his health is sound, threatens her with infection, and their offspring with hereditary disease, a case is presented for state interference and judicial annulment." *Anonymous*, 34 Misc 109, 69 NY Supp 547.

In one instance, a court stated in annulling a marriage on the ground of fraud in the concealment of a venereal disease by one of the parties: "If it were found that she was fully aware of her condition, she would have been guilty of a fraudulent concealment in not disclosing it to the petitioner. It would be an essential fact, entirely within her knowledge, not within his, nor open to his observation nor to his inquiry upon any reasonable principles which do, or should, prevail in conducting the negotiations which lead up to entering into the contract of marriage. It would be both indelicate and offensive to enter upon such inquiries. In such a case, if she did not care to disclose her condition she should have declined his advances." *Ryder v. Ryder*, 66 Vt 158, 28 Atl 1029, 44 Am St Rep 833.

The fact that the parties did not actually have sexual relations at any time has been held not to vary the effect of concealment of a venereal condition as constituting grounds for an annulment. *Svenson v. Svenson*, 178 NY 54, 70 NE 120.

"What a practical recovery from such a disease may import, where it has existed for more than two years, with the danger of its return and ultimate transmission, it is difficult if not impossible to determine. But it is certain, at least, that at the time of the marriage the defendant was incapable of meeting the obligations and performing the functions of the

marital relation, and was morally and physically unfit to become or continue to be the husband of a pure and innocent girl. When he concealed that condition from her and still induced her to marry him in ignorance thereof, he was guilty of a base and unmitigated fraud as to a matter essential to the relation into which they contracted to enter. Obviously the principle that refuses relief in cases of ordinary ill health after the marriage contract has been actually consummated has no application to a case like this, where there has been no consummation, and the disease is one involving disgrace in its contraction and presence, contagion in marital association, and includes danger of transmission and heredity that even science cannot fathom or certainly define. The suppression of the presence of a disease including such dire and disastrous possibilities, directly affecting the marital relation, constitutes a fraud which clearly entitled the innocent party to a decree annulling the marriage contract, particularly when it has not been consummated." Ibid.

Condonation by a spouse of a condition of venereal disease in the other may preclude an annulment, but it is essential that such condonation result from full knowledge of the facts. *Wilson v. Wilson*, 16 RI 122, 13 Atl 102.

"Her husband had syphilis, but nevertheless continued to cohabit with her, the consequence being that she had a syphilitic sore throat. He told her the name of the trouble, but, to exculpate himself, ascribed it to a false cause, namely, drinking from a cup which had been used by a person infected, and did not restrain himself. It is difficult to imagine a worse or more insidious form of cruelty. The petitioner testifies that she did not know the nature of the disease, notwithstanding he had named it, and though there were things which might have opened her eyes, we are inclined to believe that it was not until the physicians, summoned at our request, had given their testimony that she fully realized to what a shameful and dangerous disorder he had exposed her. It is not supposed that a lady bred up in family seclusion has the same understanding of such matters as the average man. The respondent evidently did not think the petitioner had it. When the defense is condonation, it is for the respondent to prove it; and of course, if the petitioner did not know what the offense was, she cannot be held to have condoned it; and

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we may add that it is easier to believe that she did not know, because it is so difficult to believe that if she had known she either would or could have condoned it." Ibid.

INDEPENDENT CONTRACTOR, ACTION INVOLVING

The following questions may aid counsel in isolating the pertinent factors determinative of the relationship of independent contractor:

- 1—Who hired the workman? Did he solicit the work, or was he summoned for the job?
- 2—What agreement was made respecting pay for the work? Who was to make such payments, at what periods, upon what conditions, and who was to determine compliance with such conditions as a preliminary to payment?
- 3—What instructions or suggestions were given to workman on execution of work? Who gave same? Were they explicit directions or mere suggestions? In writing or oral?
- 4—During course of work, what instructions or suggestions were given? By whom? At what stages?
- 5—Were any workmen hired to assist the contracting party? By whom? Payment to be made by whom?
- 6—Who controlled the movements, and duration of employment of such workmen?
- 7—Who furnished the material, tools, appliances, and equipment for performance of the work? At whose expense?
- 8—Who conceived the original plan for how the work was to be performed?
- 9—What training or skill is possessed by the workman for the specific task involved? Is he a mere laborer or general workman?
- 10—Who directed flow of materials and their placement?

The courts have propounded a wide variety of tests as to what constitutes an independent contractor, and the essential characteristics of such a party have been defined with varying degrees of exactitude. Generally, an independent contractor is one who meets certain basic requirements with respect to the character of the work he undertakes, his independence in the execution thereof, and the degree of independence he may exercise in the planning and laying out of the work. An all-inclusive test is difficult of statement, if not impossible,

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due to the varying circumstances in each case, and the need for evaluating each set of facts in the light of its own background.

The basic, and most frequently cited, requirement is that of independence in the execution of the work involved, according to the methods and ideas of the contractor. *Alexander v. Sherman*, 86 Conn 292, 85 Atl 514; *Foster v. Wadsworth-Howland Co.* 168 Ill 514, 48 NE 163; *Bodwell v. Webster*, 98 Neb 664, 154 NW 229; *Embler v. Gloucester Lumber Co.* 167 NC 457, 83 SE 740; *Karl v. Juniata County*, 206 Pa 633, 56 Atl 78; *Richmond v. Sitterding*, 101 Va 352, 43 SE 562, 99 Am St Rep 879.

"An independent contractor is said to be one who, exercising an independent employment, contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer, except as to the result of the work, and who has the right to employ and direct the action of the workmen, independently of such employer, and freed from any superior authority in him to say how the specified work shall be done or what the laborers shall do as it progresses." *Embler v. Gloucester Lumber Co.* 167 NC 457, 83 SE 740.

"In every case the decisive question in determining whether the doctrine of respondeat superior applies is, had the defendant the right to control, in the given particular, the conduct of the person doing the wrong? If he had, he is liable. On this question, the contract under which the work was done must speak conclusively in every case, reference being had, of course, to surrounding circumstances. If defendant had such control, the mere fact that the agent who did the injury carried on a separate and independent employment will not absolve his principal from liability. If this control existed, it makes no difference whether the person doing the injury was the 'servant' of the defendant, in the popular sense of that word, or a person merely employed to do a specified job or piece of work." *Rait v. New England Furniture & Carpet Co.* 66 Minn 76, 68 NW 729.

It is clear, therefore, that an essential inquiry in all cases involving the existence of an independent contractor relationship, is the nature of any directions, suggestions, ideas, plans, or schemes conveyed by the party engaging the services of

the independent contractor to the latter. As aptly suggested in this connection: "The relation of the parties under a contract of employment is determined by the answer to the question: Does the employee in doing the work submit himself to the direction of the employer, both as to the details of it and the means by which it is accomplished? If he does, he is a servant, and not an independent contractor. If, on the other hand, the employee has contracted to do a piece of work, furnishing his own means and executing it according to his own ideas, in pursuance of a plan previously given him by the employer, without being subject to the orders of the latter as to details, he is an independent contractor." *Allen v. Bear Creek Coal Co.* 43 Mont 269, 115 Pac 673.

Proceeding beyond the initial hiring or engagement, detailed consideration must be given to the actual performance of the work. A practical test is suggested in the following: "The test is: Which party controls the work while it is progressing? Who has charge of the management and control of the forces, and who controls the movement and location of the material used in the construction? Who hires the workmen, buys the material, arranges the details, directs and superintends the labor, and is responsible for all failures which do not meet the requirements of the contract, or fulfill the specifications? Who alone is responsible for results produced by separate and independent management? Who has control of the mode and manner of doing the work, subject only to a provision that it must be equal to a fixed rule, or a certain degree of excellence? When that is determined, liability is fixed." *St. Louis, Ft. S. & W. R. Co. v. Willis*, 38 Kan 330, 16 Pac 728.

"The fact that there was no right of control cannot be predicated upon an absence of the exercise of it in practice, if the contract in fact allows the right. The employer would be very likely to refrain from exercising a direction or control over an employee as to whom he had the undoubted right of control, merely because the employee had a greater knowledge concerning the nature of the work to be done than did the employer himself." *Rosedale Cemetery Asso. v. Industrial Accident Commission*, 37 Cal App 706, 174 Pac 351.

Elsewhere it is stated: "The real test as to whether a person is an independent contractor or a servant is whether the

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person alleged to be the master, under his arrangement with the other party, has or has not any authoritative control of the latter with respect to the manner in which the details of the work are to be performed." *Barton v. Studebaker Corp.* 189 Pac 1025 (Cal App)

But the mere relinquishment of full control over the acts of a person that one hires for a specific task, does not constitute an inclusive test for the existence of an independent contractor relationship. Thus, a mere worker, without any skill or specialized training, who is engaged for a job, after he expresses his willingness to assume any one of several employments, may not fall within the class of an independent contractor. *Mullich v. Brocker*, 119 Mo App 332, 97 SW 549.

This distinction is well developed in the following holding:

"Without attempting to lay down a general rule for ascertaining when the law will treat a person doing work as a contractor, and when the relationship of master and servant will be inferred, we think it apparent that the court below was in error in holding as a conclusion of law that Schoenborn was an independent contractor, for this reason; so far as appears he had no regular vocation, and hired to the defendant as the result of soliciting casual employment. We find no countenance for the proposition that a person not especially qualified for a particular service, but ready to undertake any job which may be offered to him that he thinks himself able to perform, becomes, when hired for some job, an independent contractor, simply because the employer relinquishes control over the work and trusts to the employee's discretion. It looks like the employee must have a calling in which it is fair to presume he has developed skill, before he will be regarded otherwise than as a servant. We do not say he must have a trade or profession—be a skilled mechanic, doctor, or lawyer; but he must hold himself out as having an occupation with which he is familiar." *Mullich v. Brocker*, 119 Mo App 332, 97 SW 549.

The question may arise as to the liability of a father for acts of a minor son whom he had engaged to perform certain work, delegating to such child full discretion as to the manner in which the work was to be performed. Assuming that the infant is not emancipated at the time of the hiring, and that no statutory authority exists to the contrary, the following

statement of law summarizes the holdings on this question.

"It would be pushing the rule absolving an employer from liability for the negligence of an independent contractor to an unwarrantable extent, to extend it to the case of a father who contracts with his minor son. The reason upon which rests the rule holding employers not liable for the negligence of independent contractors fails where the contractor is the infant child of the employer. The reason supporting the rule is that the employer has no control over the acts of the contractor in the performance of the work, and ought not to be held responsible for that over which he has no authority or power. The right to control is the test by which to determine whether the relation of employer and contractor exists. In legal contemplation, the minor child is within the control of the parent, and there can be no doubt that, as a general rule, the theory of the law corresponds with the actual fact. Not only does the principle we have referred to require that it should be held that a father cannot evade responsibility for the negligent manner in which his minor son does an act which he commanded to be done, but there are other strong reasons leading to the same conclusion. If a man were permitted to escape liability upon the ground here relied on, it would be easy to perpetrate great wrongs, and leave the injured person to proceed against irresponsible persons under legal disabilities; and it would also open a way for unscrupulous persons to evade liability for torts committed in their behalf, by wrongfully shifting the responsibility to those subject to their commands. The general rule is that a father is not responsible for the torts of his minor child; but this rule does not apply to cases where the tort is committed by the child while engaged in performing work directed by the father. Where a child is engaged in the father's service, and in doing work authorized or commanded by him, he is responsible for loss resulting to others from the negligence of the child." *Teagarden v. McLaughlin*, 86 Ind 476, 44 Am Rep 332.

In construing the common terms, "manner," "method," and similar phrases used in describing the performance of the work, courts have refused to be bound by any abstract rules, but generally determine the meaning of such terms in the light of the facts in each case. As stated: "Manner must,

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in such case, mean the power to control the work, not only as to its character, but also as to the particular means used to accomplish it. . . . A stipulation for general supervision of the work does not reduce the contractor to the grade of an agent, although necessarily, in such case, the engineer must, to some extent, control the manner in which the contract is performed. . . . The word 'manner' must be construed with reference to the contract in which it is found." *Erie v. Caulkins*, 85 Pa 247, 27 Am Rep 642.

**INDORSEMENT, MODIFICATION BY
PAROL EVIDENCE**

(Modification of indorsement by parol)

Q—You are the defendant in this action?

Q—Did you, on or about September 7th, 1943, have a conversation with one William Brown?

Q—Do you recall the exact time and place of this conversation?

Q—During that conversation did you have occasion to discuss indorsement by you of a note then in your possession?

A—Yes.

Q—Did you thereafter execute and deliver a note to this person? A—Yes.

Q—Is this the note you signed and delivered to William Brown?

(Showing plaintiff's exhibit.)

Q—Is the indorsement thereon in your name in your own handwriting? A—Yes.

Q—Now will you tell this court and jury the nature of the conversation you had with this man at the time you delivered the note to him?

(Plaintiff's counsel: I object to the introduction of oral proof to change or alter an indorsement in writing.)

(Defendant's counsel: The evidence is offered for the purpose of showing that the indorsement was to an agent, and delivery made to William Brown, as an agent for the plaintiff, for the specific purpose of having the note discounted at the bank, without any intent to pass title to the plaintiff.) (See text.)

The rule is well settled that when an instrument that has had a valid inception in the hands of the payee is later transferred with the intent to pass all title and interest therein, and indorsed as evidence of such intent, parol evidence may not, as between the parties, vary or explain the contract thereby made by proof of a prior or contemporaneous agreement. *Guaranty Invest. Co. v. Gamble*, 102 Kan 791, 171 Pac 1152; *Martin v. Cole*, 104 US 30, 26 L ed 647; *Goldman v. Davis*, 23 Cal 256; *Torbert v. Montague*, 38 Colo 325, 87 Pac 1145; *Dale v. Gear*, 38 Conn 15, 9 Am Rep 353; *Schine v. Johnson*,

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92 Conn 590, 103 Atl 974, 4 ALR 744; *Lloyd v. Matthews*, 223 Ill 477, 79 NE 172; see also cases collected in 4 ALR 765; *Hawkins v. Shields*, 100 Miss 739, 57 So 4, 4 ALR 760.

Thus, it has been held that evidence of an oral agreement made at the time of signing the indorsement to the effect that the indorser would not be liable on his indorsement, is a variance of the terms of the agreement, and hence inadmissible. *Martin v. Cole*, 104 US 30, 26 L ed 647.

Similarly, it has been held that oral evidence is not admissible to show an agreement providing for waiver or demand and notice, upon the theory that such evidence constitutes a modification of the written agreement. *Torbert v. Montague*, 38 Colo 325, 87 Pac 1145; *Foley v. Emerald Brewing Co.* 61 NJL 428, 39 Atl 650.

Nor can an indorser show by an oral agreement that it was intended by his indorsement merely to transfer title to the indorsee, without any liability being incurred on the part of the indorser. *Guaranty Invest. Co. v. Gamble*, 102 Kan 791, 171 Pac 1152.

It is aptly pointed out that "parol evidence is never admissible to contradict or vary the terms of a valid written instrument. While this general principle is admitted to be applicable to all contracts written out in full, some authorities are not willing to apply this principle to those contracts which are raised from implication by the operation of law, such, for instance, as indorsements in blank. Such seems to be the rule in Pennsylvania, North Carolina, Florida, Colorado, and Connecticut; but this doctrine is certainly opposed to the great weight of authority, and also to the better reason. When it appears from an inspection of the paper that the party is an indorser, there seems to be no just ground for the distinction taken between the implied contract from his mere name thereon written, and contracts written out in extenso. The signature of the indorser upon the bill or note is as marked a manifestation of the intention of the party as if the contract were set forth in express words. All of the authorities hold that, though there be nothing but the indorser's signature, the indorser's contract is as fully expressed as that of the drawer of the bill or maker of a note payable to bearer; and it is a general rule, supported by the great weight of authority, that the indorser in a suit brought by the indorsee, whether mediate or remote, cannot show by parol that it was agreed that

the indorser should not be liable, and that his indorsement was without recourse to him." *Hawkins v. Shields*, 100 Miss 739, 57 So 4, 4 ALR 760.

"The indorsement of a bill or note is not merely a transfer thereof; but it is a fresh and substantive contract, embodying all of the terms of the instrument in itself. The indorsement of a bill is equivalent to the drawing of a new bill by the indorser upon the drawee in favor of the indorsee; and the indorsement of a note is equivalent to the drawing of a bill upon the maker, who stands in the relation of acceptor, as it were, in favor of the indorsee. So entirely distinct and independent is the contract of an indorser of a note thereof and the maker that at common law a separate action against each was indispensable. The indorser engages that the bill or note will be accepted or paid, as the case may be, according to its purport; but this engagement is conditioned upon due presentment or demand and notice. It also engages that it is in every respect genuine, that it is the valid instrument it purports to be, that the ostensible parties are competent, and that he has the lawful title to it and the right to indorse it. Such is the nature and effect of the contract of indorsement as shown by all of the authorities." *Hawkins v. Shields*, 100 Miss 739, 57 So 4, 4 ALR 760.

It is pointed out that as between "the indorser and indorsee there is no difference in the contract of indorsement, so far as the rights and liabilities of the indorser are concerned, when the indorsement is made before and when made after maturity; the only difference being that, when the indorsement is made before the maturity of the bill or note, the time of payment is fixed by the terms of the instrument itself; but when the indorsement is made after maturity, payment must be demanded of the payor within a reasonable time and notice in the event of a refusal given to the indorser in order to charge him. In such an instance the instrument is regarded as being equivalent to one payable on demand." *Hawkins v. Shields*, 100 Miss 739, 57 So 4, 4 ALR 760.

It has been held that a written agreement made at the time of the indorsement to the effect that the indorser should not be held liable on his indorsement, is valid and fully binding on the parties to the agreement. *Davis v. Brown*, 94 US 423, 24 L ed 204.

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But there are a few jurisdictions, expressive of the minority view upon this subject, which allow oral agreements to be shown in modification of an indorsement, regardless of whether such indorsement is in full or in blank. See cases set out in 4 ALR 778.

It may further be noted that some courts allow oral proof for the purpose of showing that the indorsement was made specifically to an agent, and for a special purpose, not apparent on the face of the instrument itself. *Avery v. Miller*, 86 Ala 495, 6 So 38.

Thus, it has been held competent for an indorser to show that he indorsed a note and delivered it to an agent of the plaintiff for the specific purpose of having him discount same at a bank, and without any intent of passing title thereto to the plaintiff. *Ibid*.

INNKEEPER, LIEN UPON PROPERTY OF GUEST

An innkeeper may assert a lien upon property of a guest who has not paid the amount properly due board or food. This lien is pursuant to the common law, and exists independent of statute, notwithstanding there are statutory provisions definitive of the subject matter. See 28 Am Jur p 624, § 123.

But where statutory provisions exist, they supersede the common law, at least to the extent that they are inconsistent therewith. Ibid.

The lien is for the reasonable value of the service or accommodation provided, as for example, food, boarding or entertainment. Ibid.

The lien ordinarily extends to all property which the guest brings with him at the time of the inception of the relationship, or subsequent thereto. *Cook v. Kane*, 13 Or 482, 11 P 226.

This rule is illustrated by the holdings that property of a third person which the guest brings with him is subject to an innkeeper's lien, providing of course, that the innkeeper does not possess knowledge of the true ownership of the property. *Wertheimer-Swartz Shoe Co. v. Hotel Stevens*, 38 Wash 409, 80 Pac 563.

It is not the duty of an innkeeper to inquire of a guest whether property being brought into the hotel belongs to such guest; he may properly assume that title thereto is in the guest by virtue of his custody of same. *Horace Waters v. Gerard*, 189 NY 302, 82 NE 143.

But in some jurisdictions statutes have limited the innkeeper's lien to property of the guest exclusively, except in specified instances. 28 Am Jur p 629, § 129.

The lien ordinarily attaches when the services or accommodations are furnished, and may be divested when the innkeeper parts with possession of the property, either by agreement between the parties or a voluntary relinquishment. 28 Am Jur p 631, § 130.

Enforcement of the lien is generally made in accordance with the statutory provisions of the particular jurisdiction, which should be carefully followed.

INNKEEPER AND GUEST, PROVING RELATIONSHIP

The question whether a person procuring accommodation at an inn or hotel is a guest or a boarder, is largely one of fact to be determined by the facts and circumstances of each case. See cases collected in 12 ALR 261.

The mere fact that payment for the accommodation is made at a fixed rate per week, or month, is not sufficient to constitute the accommodated person a boarder or lodger; but is merely one circumstance to be considered in evaluating the true relation between the parties. *Beale v. Posey*, 72 Ala 323; *Pettit v. Thomas*, 103 Ark 593, 42 LRA(NS) 122, 148 SW 501, Ann Cas 1914B 726; *Fay v. Pacific Improv. Co.* 93 Cal 253, 16 LRA 188, 27 Am St Rep 198, 26 Pac 1099, 28 Pac 943; *Magee v. Pacific Improv. Co.* 98 Cal 678, 35 Am St Rep 199, 33 Pac 772; *Blake v. De Jonghe Hotel & Restaurant Co.* 174 Ill App 129, reversed on other grounds in 260 Ill 348, 103 NE 225, Ann Cas 1914D 365; *Hardcastle v. Ryder*, 175 Ill App 430; *Gross v. Saratoga European Hotel & Restaurant Co.* 176 Ill App 160; *Shoecraft v. Bailey*, 25 Iowa 553; *Norcross v. Norcross*, 53 Me 163; *Hall v. Pike*, 100 Mass 495; *Polk & Co. v. Melenbacker*, 136 Mich 611, 99 NW 867; *Lusk v. Belote*, 22 Minn 468. See also *Ross v. Mellin*, 36 Minn 421, 32 NW 172; *Metzger v. Schnabel*, 23 Misc 698, 52 NY Supp 105; *Hancock v. Rand*, 94 NY 1, 46 Am St Rep 112, affirming 17 Hun 279; *Holstein v. Phillips*, 146 NC 366, 14 LRA(NS) 475, 59 SE 1037, 14 Ann Cas 323; Annotation: 12 ALR 261.

In *Norcross v. Norcross*, *ibid*, it was stated: "If a person goes to an inn as a wayfarer and a traveler, and the innkeeper receives him into his inn as such, he becomes the innkeeper's guest, and the relation of landlord and guest, with all its rights and liabilities, is instantly established between them. Neither the length of time that a man remains at an inn, nor any agreement he may make as to the price of board per day or per week, deprives him of his character as a traveler and a guest, provided that he retains his status as a traveler in other respects."

If a person is registered at a hotel as a guest, the fact that after he remained a week he was charged at a weekly

rate, was held not to alter his status as a guest. *Polk v. Melenbacker*, *ibid*.

It is clear, however, that the fact of payment for a specific term, as by the week or month, may, when considered in connection with other circumstances, place the accommodated person in the position of a boarder, as distinguished from a guest. *Haff v. Adams*, 6 Ariz 395, 59 Pac 111, 7 Am Neg Rep 1; *Moore v. Long Beach Development Co.* 87 Cal 483, 22 Am St Rep 265, 26 Pac 92; *Baker v. Stafford*, 145 Ill App 263; *Gray v. Drexel Arms Hotel*, 146 Ill App 604; *Miles v. International Hotel Co.* 167 Ill App 440; *Johnson v. Reynolds*, 3 Kan 257; *Vance v. Throckmorton*, 5 Bush 41, 96 Am Dec 327; *Horner v. Harvey*, 3 NM 307, 5 Pac 329; *McIntosh v. Schops*, 92 Or 307, 180 Pac 593; *Jeffords v. Crump*, 12 Phila 500; *Meacham v. Galloway*, 102 Tenn 415, 46 LRA 319, 73 Am St Rep 886, 52 SW 859; *Manning v. Wells*, 9 Humph 746, 51 Am Dec 688; *Lawrence v. Howard*, 1 Utah 142; *State v. Johnson*, 4 Wash 593, 30 Pac 672, 9 Am Crim Rep 145.

In some instances, the fact that the person involved stayed at the hotel and paid by the week or month, and had no other place of abode, has been stressed as a factor in deciding his status as boarder. *State v. Johnson*, 4 Wash 593, 30 Pac 672.

The proof should make clear the character of any agreements between the parties, whether oral or written; the past relationships between the parties, and the character thereof; the amount of money paid, and any understanding, custom or general practice in that community relative to such payment or explanatory thereof; any posted rules or regulations in the building, and their effect upon the relationship of the parties; and the mode of payment for the board, as well as the nature of the value to be given in return for such payment.

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INNKEEPER; ACTION AGAINST, LOSS OF PROPERTY

- Q—You are the plaintiff in this action?
- Q—Did you register at the Lenox Hotel on or about the 8th day of June, 1944?
- Q—Do you recall the exact date you registered at the hotel?
- Q—What property, if any, did you take with you into the hotel? A—A large suitcase, two brief cases, etc.
(The property involved should be described in detail.)
- Q—What did you do with the brief cases? A—I checked them with the clerk at the desk.
- Q—Did you receive a receipt or other memoranda at the time you checked this property?
- Q—Do you have that receipt with you?
(Offered in evidence.)
- Q—Do you know the name of the clerk or employee that took your brief cases?
- Q—Could you identify him if you saw him?
- Q—Do you see that person in the courtroom?
(Plaintiff should be prepared to show that proper delivery of the goods was made.)
- Q—Did you thereafter make demand for the return of this property? A—I did.
- Q—When was this demand made?
- Q—To whom did you make the demand?
- Q—And did you receive back the property? A—No.
(The following questions may be helpful where property is missing from a room.)
- Q—Describe the suitcase that you brought into the hotel.
- Q—What articles of property were in that suitcase?
- Q—What did you do with the suitcase after registering at the hotel? A—I brought it up to my room.
- Q—Did you have occasion to leave your room on the following day?
- Q—What time did you leave your room on that day?
- Q—Was your suitcase in the room at the time you left?
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Q—Was it there upon your return?

(Plaintiff should be prepared to show extent of damage sustained by competent proof of value.)

There are two conflicting views with respect to the liability of an innkeeper for loss of, or damage to, valuables or property of a guest. According to one view, an innkeeper assumes the status of an insurer of the property of a guest when he receives same, so that where loss or damage occurs, he is liable except in the instance of an act of God or the public enemy, or an act of the guest himself. *Davidson v. Madison Corp.* 257 NY 120, 177 NE 393, 76 ALR 1103; *Palace Hotel Co. v. Medart*, 87 Ohio St 130, 100 NE 317; *Maxwell Operating Co. v. Harper*, 138 Tenn 640, 200 SW 515.

Elsewhere an innkeeper is held liable only in the event of a showing of negligence, or lack of care, proximately causing the damage or loss complained of by the guest. *Rockhill v. Congress Hotel Co.* 237 Ill 98, 86 NE 740; *McDaniels v. Robinson*, 26 Vt 316, 62 Am Dec 574. See also 28 Am Jur p 586, § 67.

In cases falling within the latter category, the guest establishes a *prima facie* case merely by showing the facts establishing his relationship to the innkeeper as that of guest, the ownership of specific property by the guest, and the circumstances surrounding its loss, or damage. *Ibid*.

The innkeeper thereupon shifts the burden of explanation to the plaintiff by showing facts and circumstances indicative of due care and prudence on his part in caring for the property of the guest, and that the loss or damage took place without any fault or lack of care on the part of the defendant. *Read v. Amidon*, 41 Vt 15, 98 Am Dec 560.

In cases involving loss or damage to property of a guest, it is important that the plaintiff be fully prepared to establish the relationship existing at the time of the loss, and the length of time prior thereto that such relationship continued. 28 Am Jur p 586, § 67.

In this connection, it may be noted that an innkeeper is held liable in some jurisdictions for property left in his custody by a person who does not occupy the technical status of a guest. Thus, it has been ruled that where a person enters a hotel with the intention of becoming a guest, without actual-

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ly consummating the relationship until a later time, and brings upon the premises property which he leaves with those in charge, the innkeeper will be liable for loss or damage. *Coskery v. Nagle*, 83 Ga 696, 10 SE 491; *Hill v. Memphis Hotel Co.* 124 Tenn 376, 136 SW 997 (see also *Healey v. Gray*, 68 Me 489, 28 Am Rep 80, holding that this rule will not apply where the relationship of guest and innkeeper does not later actually take place, as where the owner of the property did not originally intend to become a guest).

Counsel should also be fully prepared on the nature and extent of any agreements between the parties, limiting or extending the liability of the innkeeper for loss of, or damage to, the guest's property. It is well settled that an innkeeper may enter into a private agreement with a guest respecting the custody of property entrusted to the innkeeper. *McDaniels v. Robinson*, 26 Vt 316, 62 Am Dec 574.

Where a private agreement has been entered into between the parties, the plaintiff should examine fully into the provisions thereof, and note in what respects the innkeeper has limited his liability, and under what circumstances it may be fairly said the guest has, or has not, complied with any provisions or conditions precedent to the inception of any liability on the part of the innkeeper.

According to some authorities, when a person occupying the status of guest places property within the custody of an innkeeper, during the continuance of such relationship, a bailment is created, with the duties and liabilities characteristic of such relationship.

See BAILMENT, ACTION INVOLVING.

Counsel should examine carefully into the following matters in preparing a case of the character under consideration:

- 1—Did the innkeeper post regulations or rules relative to property of a guest at the hotel?
- 2—How prominently were such rules or regulations displayed? (Make an exact copy of same.)
- 3—What statutory provisions exist in the particular jurisdiction relative to liability of an innkeeper for property of a guest?
- 4—Did any rules of the innkeeper, either posted or otherwise conveyed to the guest, limit liability to specific amounts,

or require any affirmative declaration of value by the guest?

- 5—To what extent do the surrounding circumstances show knowledge on the part of the guest relative to any regulations or restrictions of liability?
- 6—If the innkeeper has effectively limited liability by a posted or private agreement, examine the facts to see whether there has been any waiver thereof by the innkeeper.
- 7—Has the innkeeper provided a safe or vault for the safe-keeping of valuables? To what extent has this fact been made known to guests?

See 28 Am Jur p 585, § 67.

An important role in cases involving an innkeeper's liability is that of statutory provisions affecting the extent and nature of such liability. Generally, it may be stated that such statutory provisions are strictly construed in favor of the guest. *Leon v. Kitchen Bros. Hotel Co.* 134 Neb 137, 277 NW 823.

Thus, it has been held that statutory requirements relative to posting of a notice in the hotel premises relative to checking of valuables, or the nature of the facilities available for safekeeping of valuables, or limitations upon the liability of the innkeeper, must be strictly followed in order to be effective. *Holstein v. Phillips*, 146 NC 366, 59 SE 1037; *Goodwin v. Georgian Hotel Co.* 197 Wash 173, 84 Pac(2d) 681, 119 ALR 788.

In one instance, it was held that a notice posted in a hallway did not comply with a statutory requirement for posting in a public room. Annotation: 119 ALR 798.

Some cases hold that actual notice on the part of the guest of the provisions sought to be set out in the public notice, is sufficient to establish the fact of knowledge on the part of the guest, thus excusing failure of the proprietor of the hotel to post according to statutory provisions. *Shultz v. Wall*, 134 Pa 262, 19 Atl 742, 8 LRA 97.

Other decisions adhere to the view that there must be full and complete compliance on the part of the innkeeper with the statutes respecting posting of rules and regulations, irrespective of actual knowledge on the part of the guest. *Johnston v. Mobile Hotel Co.* 27 Ala App 145, 167 So 595.

The plaintiff should establish delivery of the property involved to the innkeeper or an authorized agent or employee.

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Stoll v. Almon C. Judd Co. 106 Conn 551, 138 A 479, 53 ALR 1042.

Accordingly, a delivery to a person not authorized to receive same on behalf of the innkeeper, is not a valid delivery for the purpose of imposing liability on the latter for damage to, or loss of; a guest's property. 28 Am Jur p 597, § 80.

**JUDICIAL OFFICER, LIABILITY FOR
FALSE IMPRISONMENT**

Q—You are the plaintiff in this action?

Q—Were you served with a warrant in a proceeding in the Justice of the Peace Court for the Town of Westwood, on or about the 18th day of June, 1943? A—I was.

Q—Do you recall the exact date?

Q—Who served this warrant upon you?

Q—Did you thereafter appear at the court, pursuant to this warrant? A—Yes.

Q—When was this appearance made?

Q—Do you recall before whom it was that you appeared?
A—The defendant in this action.

Q—Were you informed of the nature of the offense charged against you?

Q—Will you now tell this court and jury the nature of the proceedings that were held at that time? A—I was examined by the defendant, and bail was fixed at \$2,000.

Q—Did you furnish this bail? A—No.

Q—What, if anything, thereafter happened to you? A—I was imprisoned, etc.

(The act of a justice of the peace, in making a commitment, where he lacks any semblance of authority in so doing, is sufficient to predicate an action for false imprisonment. See text.)

The broad rule is well settled that where a judicial officer has acquired proper jurisdiction of the person and the subject matter, he is legally exempt from any liability, civil or criminal, for acts which might otherwise constitute false imprisonment. *Casey v. Casey*, 142 Ark 246, 218 SW 678; *McVeigh v. Ripley*, 77 Conn 136, 58 Atl 701; *Clark v. Hampton*, 163 Ky 698, 174 SW 490; *Olmstead v. Edson*, 71 Neb 17, 98 NW 415; *Steele v. Rachfuss*, 93 Misc 332, 157 NY Supp 103; See also 13 ALR 1345.

The theory behind this rule is stated to be that "nothing is more essential and important than that the judiciary shall be independent. Every judge should feel perfectly free to follow the dictates of his own judgment; and the one thing essential to that independence is that they shall not be ex-

posed to a private action for damages for anything that they may do in their official capacity. No judge would feel free if he knew that upon the rendition of a judgment or order he might be subjected to a suit by the defeated party, and in the event that it should be held erroneous, and that he had mistakenly exceeded his jurisdiction and powers in some particular; be mulcted in damages." *Comstock v. Eagleton*, 11 Okla 491, 69 Pac 955.

A distinction is drawn between acts of a ministerial officer and those of a judicial officer. "A ministerial officer has a line of conduct marked out for him, and has nothing to do but to follow it; and he must be held liable for any failure to do so which results in the injury of another. A judicial officer, on the other hand, has certain powers confided to him, to be exercised according to his judgment or discretion; and the law would be oppressive which should compel him, in every case, to decide correctly at his peril. It is accordingly a rule of very great antiquity that no action will lie against a judicial officer for any act done by him in the exercise of his judicial functions, provided the act, though done mistakenly, were within the scope of his jurisdiction. . . . This principle of protection is not confined to courts of record, but it applies as well to inferior jurisdictions; the only difference being that authority in a court of general jurisdiction is to be presumed, while the jurisdiction of inferior tribunals must affirmatively appear on the face of their proceedings. . . . Nor does the rule depend upon whether the tribunal is a court or not; it is the nature of the duties to be performed that determines its application." *Wall v. Trumbull*, 16 Mich 228.

The rule of immunity generally extends to judicial officers of superior as well as inferior courts. The rule is well stated as follows:

"The rule is well established that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when those acts are in excess of their jurisdiction; and we think that the weight of authority is that this immunity from civil liability is equally applicable to a judge whose jurisdiction is limited. There is a clear distinction between an absence of all jurisdiction, and a jurisdiction exercised erroneously or irregularly over the subject-matter . . . of an alleged offense and where an officer acts with

entire good faith, he should not be held liable in damages for an erroneous decision, to a party who has been injured thereby. If he has the power under authority of law to hear and pass on cases to which the particular offense belongs, the same reason should require that he should be protected from civil liability for an erroneous decision, which exempts judges of superior or general jurisdiction from such liability." *McIntosh v. Bullard*, 95 Ark 227, 129 SW 85.

Liability will not be imposed for a mere error in judgment, resulting in the imprisonment of a defendant. Annotation: 13 ALR 1349.

It should be carefully noted, however, that a judicial officer may be held liable where he acts wholly without jurisdiction, and his acts cause the false imprisonment of a person appearing before him. *Turpen v. Booth*, 56 Cal 65, 38 Am Rep 48; *Tracy v. Williams*, 4 Conn 107, 10 Am Dec 102; *Washer v. Her*, 75 Ohio St 638, 80 NE 1134; *Heller v. Clarke*, 121 Wis 71, 98 NW 952.

"It is well settled that when a magistrate, such as a justice of the peace, having criminal jurisdiction as provided by statute, upon a complaint or information alleging facts sufficient to constitute a crime which he has jurisdiction to try or to investigate and hold thereon for the action of the grand jury, assumes jurisdiction of the person complained of or informed against, and proceeds on such complaint or information to deprive such person of his liberty for purpose of trial or examination, or otherwise, the magistrate acts entirely without legal authority or jurisdiction, and becomes liable to an action of false imprisonment on the part of the person so restrained." *Maher v. Potter*, 112 NY Supp 102.

There is often difficulty in determining what acts of a judicial officer constitute a clear excess of his jurisdiction or authority, and those that are committed without even the color of jurisdiction. *Casey v. Casey*, 142 Ark 246, 218 SW 678; *McVeigh v. Ripley*, 77 Conn 136, 58 Atl 701; *Clark v. Hampton*, 163 Ky 698, 174 SW 490; *Maher v. Potter*, 112 NY Supp 102; *Olmstead v. Edson*, 71 Neb 17, 98 NW 415; *Steele v. Rachfuss*, 93 Misc 332, 157 NY Supp 103; See also 13 ALR 1345.

The line of demarcation is suggested in the following summary of the rule:

"The true general rule with respect to the actionable

responsibility of a judicial officer having the right to exercise general powers is that he is so responsible in any given case belonging to a class over which he has cognizance, unless such case is, by complaint or other proceeding, put at least colorably under his jurisdiction. Where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong. But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems a reasonable one; it protects a judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that is practically wilful; such protection is necessary to the independence and usefulness of the judicial officer, and such responsibility is important to guard the citizens against official oppression." *Grove v. Van Duyn*, 44 NJL 654, 43 Am Rep 412.

The mere exceeding of prescribed limits of jurisdiction will not operate to impose liability upon a judicial officer. Whatever doubt formerly existed upon this point, due to conflicting expressions in the decisions, seems resolved in favor of the rule stated. *Turpen v. Booth*, 56 Cal 65, 38 Am Rep 48; *Tracy v. Williams*, 4 Conn 107, 10 Am Dec 102; *Washer v. Her*, 75 Ohio St 638, 80 NE 1134; *Heller v. Clarke*, 121 Wis 71, 98 NW 952.

"The rule is well established that judges of courts of superior jurisdiction are not liable to civil actions for their judicial acts, even where such acts are in excess of their jurisdiction. As to whether this immunity from civil liability is equally applicable to a judge of an inferior court, or to a magistrate of limited jurisdiction, is a question about which the authorities are not in entire accord. We favor the doctrine, towards which, we think there is a strong tendency in more recent judicial opinion, that where a judge of an inferior court, or a magistrate, is invested by law with jurisdiction over the general subject-matter of an alleged offense,—that is, has the power to hear and determine cases of the general class to which the proceeding in question belongs,—and de-

cides, although erroneously, that he has jurisdiction over the particular offense of which complaint is made to him, or that the facts charged in the complaint constitute an offense, and acts accordingly in entire good faith, such erroneous decision is a judicial one for which he should not be, and is not, liable in damages to a party who has been thereby injured. We can perceive of no good reason why the judge of general local, but inferior, jurisdiction, should not be as fully protected against the consequences of his erroneous judicial decision concerning a matter within the limits of his general jurisdiction over offenses of the same general nature, as should judges of superior courts for their judicial mistakes. In the application of this doctrine, the distinction must be observed between mere excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter." *Rush v. Buckley*, 100 Me 322, 61 Atl 774, 4 Ann Cas 318.

The rule of immunity has been extended to justices of the peace. *Curnow v. Kessler*, 110 Mich 10, 67 NW 982.

"The justice having obtained jurisdiction of the subject-matter, the rule is well settled that no action can be sustained against him for the recovery of damages by one claiming to have been injuriously affected by his judicial action. It is indispensable to the administration of justice that a judge or other judicial officer, who acts within the scope of his jurisdiction, may act freely, without any fear of being held responsible in a civil action, or having his motives brought in question by one injuriously affected by his judgments. This immunity is uniformly held not to be affected by the motives with which it is alleged that the judicial officer has performed his duty. If the officer be in fact corrupt, the public has its remedy, but the defeated suitor cannot be permitted to obtain redress against the judge, by alleging that the judgment against him was the result of corrupt or malicious motives." *Ibid.*

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LAUNDRY, LOSS OR DAMAGE OF CLOTHING

(Action against cleaner for failure to deliver article left for cleaning)

Q—You are the plaintiff in this action?

Q—Did you, during July of 1942, deliver a coat to the defendant for cleaning?

Q—Do you recall the exact date you delivered this coat?

Q—To whom did you turn over the coat?

Q—What instructions, if any, did you give at the time you left this coat with the defendant?

Q—Did you receive a receipt from the defendant?

Q—I show you a paper, and ask if this is the receipt to which you refer?

(Marked in evidence as plaintiff's exhibit.)

Q—Did you thereafter present this receipt to the defendant and make demand for return of your coat?

Q—When did you make this demand?

Q—Was the coat returned to you? A—No.

Q—What explanation, if any, did the defendant offer you for his failure to return the coat?

(The plaintiff's proof should be clear in showing the value of the lost article at the time of its delivery to the defendant.)

(Questions to show value of coat returned in damaged condition.)

Q—How long have you been engaged in the fur cleaning business?

Q—Are you generally familiar with the value of sable coats?

Q—Did you, sometime before July 1st, 1942, have occasion to examine a sable coat owned by the plaintiff in this action?

Q—State the circumstances under which you made this examination. A—The coat was left with me in May, 1942, for repair of a sleeve lining.

Q—Did you thereafter have occasion to again examine this garment?

Q—On what date was this second examination held? A—In August, 1942.

- Q—State the condition of the coat as you then observed.
 A—The fur was hard and brittle, and the coat had shrunk, etc.
- Q—Are you able to state, with reasonable certainty, whether prolonged exposure to heat and water is a competent producing cause of shrinking of sable fur, and a hardening of the hairs? A—I can.
- Q—Will you so state. A—I believe these factors can cause a fur coat to shrink, and the hairs to stiffen.

It is generally conceded that a cleaning and dyeing service is a bailee for hire, as respects clothing sent to it for cleaning. *Wiegert v. Davis Cleaning & Dyeing Co.* 254 Ill App 63; *Woodward v. Royal Carpet Cleaning Co.* 16 La App 555, 134 So 443; *Corbin v. Gentry & F. Cleaning & Dyeing Co.* 181 Mo App 151, 167 SW 1144. Annotation: 130 ALR 1359.

Varying expressions are to be found in the decisions upon the question of the liability of such establishments for damage to, or loss of, goods entrusted to them. Generally, it may be stated that a launderer or cleaner is not held to the exercise of more than ordinary or reasonable care in this regard, and that his liability is not analogous to that of an insurer. *White Swan Laundry v. Blue*, 223 Ala 663, 137 So 898; *Wiegert v. Davis Cleaning & Dyeing Co.* 254 Ill App 63; *Woodward v. Royal Carpet Cleaning Co.* 16 La App 555, 134 So 443; *Paterno v. Kennedy The Cleaner, Inc.* 18 La App 649, 138 So 531; *Campbell v. Klein*, 52 Misc 123, 101 NYS 577; *Grant v. Miller*, 159 NYS 829; *Schwartz v. Greenberg*, 213 App Div 204, 209 NYS 746.

The law implies in cases of this character that the contract between the parties will call for the performance of the work in a competent and skillful manner, using such care as the circumstances of each case and the nature of the work requires. The law also implies that the finished product will be reasonably fit and suitable, upon completion, for its intended use. 6 Am Jur 353, § 264.

The law further implies that the bailee will use ordinary care in selecting competent employees, who will perform their tasks in a competent and skillful manner. There is obviously no duty upon the part of the bailee, in the absence of any contractual provision to the contrary, to perform the agreed

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work himself; it is entirely permissible for him to send the work to third persons to perform, subject only to the requirement that he use due care in the selection of such third persons, and in transmitting to them the orders for the manner of performance of their work. 6 Am Jur 353, § 264.

Proof by the owner of the clothing or other goods that he delivered the same to the defendant upon a specified date, received a receipt therefor, and that due and timely demand for return of the merchandise failed to result in such return, is ordinarily sufficient to raise a presumption of negligence, and establish a prima facie case of liability on the part of the bailee, whether he is a cleaner, dyer, laundry, or similar agency. *White Swan Laundry v. Blue*, 223 Ala 663, 137 So 898; *Sheets v. Star Cleaners & Dyers*, 238 Ill App 323; *More v. Fisher*, 245 Ill App 567; *Wiegert v. Davis Cleaning & Dyeing Co.* 254 Ill App 63; *Hadley v. Orchard*, 77 Mo App 141; *Corbin v. Gentry & F. Cleaning & Dyeing Co.* 181 Mo App 151, 167 SW 1144; *Cothren v. Kansas City Laundry Serv. Co.* (Mo App) 242 SW 167; *Peerless Dry Cleaning Co. v. Carmack*, 8 Tenn App 103.

Upon such showing, the burden of explanation shifts to the bailee. *Plesser v. Appel*, 113 NY Supp 1034, where the court pointed out: "The rule is that a bailee, no matter what the character of the bailment may be, when the purpose of such bailment has been fully satisfied and performed, is bound upon request to redeliver the thing bailed to its lawful owner; but such redelivery may be excused by proof that the article has been lost or destroyed without negligence or want of care on the part of the bailee, and the burden of showing such freedom from negligence is on the bailee."

Similarly, in *Red-Cross Laundry Co. v. Tuten*, 31 Ga App 689, 121 SE 865, the court held that where articles delivered to a laundry company were destroyed by a fire which burned the laundry plant of the bailee while the articles bailed were in its possession, the loss of the articles was presumably due to the negligence of the bailee and that this presumption of negligence was sufficient to authorize a verdict for the bailor in a suit against the bailee to recover for the loss of the articles, where the evidence concerning the cause of the fire was insufficient to remove every inference of negligence by the bailee.

A refusal on the part of the bailee to deliver chattels to the owner when the bailment is terminated by lapse of time or upon notice constitutes prima facie evidence of a conversion thereof. *Wolfe v. Willard H. George, Inc.* 110 Cal App 532, 294 Pac 436.

It is a common device for the owner of a laundry to attempt to limit his liability through restrictions in the receipt or memoranda left with the customer. Courts have held, however, such practice does not constitute or effect a limitation of liability. *American Laundry Co. v. Hall*, 27 Ga App 717, 109 SE 676; *Red-Cross Laundry v. Tuten*, 31 Ga App 689, 121 SE 865.

A fire or explosion resulting in the loss of goods entrusted to a laundry or cleaning establishment, may impose liability upon the owner where such occurrence can be shown as due to acts of negligence or carelessness, or to factors under his control. *Red-Cross Laundry Co. v. Tuten*, 31 Ga App 689, 121 SE 865.

Theft of the articles left with the bailee is not an occurrence that will impose absolute liability, in the absence of some proof of negligence on the part of the custodian of the goods. *Southern Steam Carpet Cleaning Co. v. Goldman*, 17 Ala App 218, 84 So 478; *Paterno v. Kennedy The Cleaner, Inc.* 18 La App 649, 138 So 531; *Hadley v. Orchard*, 77 Mo App 141; *Corbin v. Gentry & F. Cleaning & Dyeing Co.* 181 Mo App 151, 167 SW 1144; *Carll v. Goldberg*, 59 Misc 172, 110 NYS 318.

It is clear that in some situations the theft may be shown to be accompanied by some proof of negligence on the part of the cleaner, dyer or laundry, as by failing to securely lock a door, hiring a watchman or custodian without adequate investigation of his character, or similar acts. In other situations, such proof will be lacking, and the issue resolves itself into a question of fact for the jury to decide upon such explanatory circumstances as are available.

See for example *Corbin v. Gentry, etc., Dyeing Co.*, 181 Mo App 151, 167 SW 1144, where the court held: "The evidence that the loss was due to burglary and theft tended to exonerate defendant but was of no greater evidentiary force than was required to raise an issue of fact for the jury. We find the evidence as a whole supports a reasonable inference that

the loss was not due to the excusatory cause assigned by defendant, and further that if the property was stolen by a burglar the theft was a natural consequence of negligence of defendant in conducting its business."

Some decisions tend to impose liability for loss of goods as a result of theft regardless of the existence of any proof of negligence on the part of the bailee. Thus, in *Carll v. Goldberg*, 59 Misc 172, 110 NY Supp, the court held a cleaner liable for loss of a coat, stolen by burglars from the bailee's place of business, notwithstanding there was a lack of evidence of any negligence or carelessness on the part of the cleaner. This decision was, however, based upon a breach of contract.

It seems clear that the owner of the goods lost or destroyed through acts outside the immediate control of the bailee should, in the absence of any facts indicative of negligence (which facts the bailee is ordinarily at a loss to procure) predicate his action upon breach of contract, rather than attempt to create a *prima facie* case of liability through negligence. *Carll v. Goldberg*, *ibid*.

A cleaner is not an insurer of the safe return of articles left in the pockets of clothing delivered to him for cleaning, but is only held to the exercise of ordinary care in seeing that such articles are safely returned to their owner. *Copelin v. Berlin Dye Works & Laundry Co.* 168 Cal 715, 144 P 961, LRA1915C 712, 12 NCCA 362, where the court pointed out that liability is not imposed upon the cleaner of clothes for articles stolen from pockets by his employee, by a statute making employers liable for wrongful acts committed by their agents in and as a part of the transaction of their business, since the stealing of the articles is not within the scope of the employee's duties even though he is required to search the clothing.

Negligence in the use of mechanical devices for the repair or cleaning of goods may also form the basis of a cause of action against the bailee.

Rosenberg v. Wilke Laundry Co. 179 NY Supp 731, where the court pointed out that the bailee knew that in "employing this method of washing, the rug would lose its sizing and that other injuries might be caused to it by reason of its character, so that in order to have protected itself the defendant should have obtained plaintiff's express permission to use the washing machine."

Where it appeared that the plaintiff sent her coat to the cleaner in good condition, and that it was returned in a hard and brittle condition, so shrunk as to be useless, the court held that proof of these factors established a prima facie case of negligence on the part of the bailee. *Dewis v. Leon*, 125 NJL 1, 13 Atl(2d) 491.

Damage to fabrics or other goods as a result of the application of chemical cleaners or mechanical devices in the hands of the bailee, may be explained or offset by evidence on the part of the defendant that the goods were in a weakened or imperfect condition upon delivery, and that the circumstances were fully explained to the owner and the risks incident to treatment made clear.

In *Gugert v. New Orleans Independent Laundries*, 181 So 653 (La App), the court stated: "It seems clear enough that a laundry should not be held responsible for the damage sustained by materials which are so badly deteriorated at the time of their delivery that they are unable to withstand an ordinary cleaning process, where it has accepted them in the regular course of business and has not been called upon to inspect their soundness."

LAWYER, ACTION FOR VALUE OF SERVICES

(See Attorney, Action for Value of Services.)

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LEASE, MODIFICATION BY PAROL EVIDENCE

(Parol evidence to explain description of premises)

Q—You are the plaintiff in this action?

Q—Where do you reside?

Q—How long have you resided at that address?

Q—Did you, on or about the 7th day of August, 1943, have any conversations with the defendant regarding rental of this property? A—I did.

Q—Did you thereafter enter into a written agreement with the defendant, based upon these conversations, for the rental of those premises? A—Yes.

Q—I show you a lease, dated August 30th, 1943, and ask if you recognize this as the agreement you have referred to? (After proper identification, introduce the lease in evidence.)

Q—I direct your attention to the term “outer building,” on page three of this exhibit, and ask if you recall any additional or further reference to this phrase in any other part of the lease? A—No.

Q—Do you recall entering into any further written agreement with the defendant regarding the meaning of the term “outer building”? A—No.

Q—Describe the character of the premises you rented.

Q—Are there any buildings upon the property, other than the main structure? A—Yes, three outer buildings.

Q—Did you have any conversations with the defendant before, or at the time you signed this lease, respecting the meaning of the term “outer building”?

(Objected to as calling for parol variance of a written agreement, but plainly admissible to explain a meaningless description.)

Q—Will you please tell this court and jury the substance of those conversations?

Q—At what times were they held?

Q—Did you thereafter, in reliance upon this conversation and the representation made therein by the defendant regarding the meaning of “outer building,” enter into the lease? A—Yes.

(Parol evidence to prove collateral agreement.)

Q—You are the plaintiff in this action?

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Q—In what business are you engaged? A—In the hotel business.

Q—Where is this business located?

Q—Do you own the building in which this hotel is located?
A—No, it is rented from the defendant.

Q—When did you first acquire occupancy of this hotel?

Q—Did you enter into any writing with the defendant regarding your rental of this hotel? A—I did.

Q—I show you a writing, purporting to be a lease, and ask if this is the writing you have reference to?

(After proper identification, introduce the lease in evidence.)

Q—Have you continuously engaged in the hotel business since taking occupancy of this building?

Q—What conversations, if any, did you have with the defendant prior to the signing of this lease with respect to the opening or management of another hotel by the defendant in the same city during pendency of this lease?

(Objected to as calling for parol evidence in modification of the consideration expressed in the lease, but admissible as a collateral independent agreement. See text.)

Q—Where were these conversations held?

Q—And at what times?

Q—Did you thereafter, in reliance upon these conversations, and the representations made by the defendant, enter into this lease? A—Yes.

The broad rule is generally stated that parol evidence is not admissible to vary or modify the terms of a written lease. *Thompson Foundry & Machine Co. v. Glass*, 136 Ala 648, 33 So 811; *Tietjen v. Snead*, 3 Ariz 195, 24 Pac 324; *Garner v. Murphy*, 131 Ark 594, 199 SW 902; *Carr v. King*, 24 Cal App 713, 142 Pac 131; *Wilson v. Agnew*, 25 Colo App 109, 136 Pac. 96; *Burr v. Spencer*, 26 Conn 159, 67 Am Dec 379; *Rector v. Hartford Deposit Co.* 190 Ill 380, 60 NE 528; *Hardin v. Sweeney*, 54 Ind App 614, 103 NE 115; *Cochran v. Scherer*, 117 Misc 765, 192 NY Supp 199.

Where a lease is plain and unambiguous, acts and declarations of the parties prior to, or contemporaneously with the execution of the lease are inadmissible in aid of its construction "because the writing is deemed to express the agreement

of the parties finally concluded between them." Annotation: 25 ALR 796.

But not unlike the tendency to admit parol proof in variance of writings generally where any of the recognized exceptions to the parol evidence rule exist, courts have recognized several well-defined exceptions in the instance of leases.

A common exception is that existing in the instance of vague terms, conditions or expressions generally, where clarification or explanation must be sought outside the instrument itself, in order to give meaning to the lease. *Pine Beach Investment Corp. v. Columbia Amusement Co.* 106 Va 810, 56 SE 822; *Bartels v. Brain*, 13 Utah 162, 44 Pac 715.

In one instance a lease referred to rental of a "buffet," without any additional information as to the meaning thereof. The court held parol evidence properly admitted to show the intent of the parties in use of this term. *Pine Beach Investment Corp. v. Columbia Amusement Co.* 106 Va 810, 56 SE 822.

The court stated in this case: "If the previous negotiations make it manifest in what sense the terms of the contract are used, such negotiations may be resorted to as furnishing the best definition to be applied in ascertaining the intention of the parties. The sense in which the parties understood and used the terms of the contract is thus ascertained. To explain the meaning of a writing in the true sense, and with this limit, is to develop the real meaning of the document. The admission of parol evidence for this purpose does not violate the rule which makes the written instrument the proper and only evidence of the agreement." *Ibid.*

A similar holding was made in the instance of a lease which made reference to the "reasonable use" of certain portions of the rented premises, there being nothing in the instrument itself to show what the parties intended by such phrase. *Bartels v. Brain*, 13 Utah 162, 44 Pac 715, where the court held:

"This evidence was admitted to explain the sense in which the terms 'reasonable care' were employed in the covenant sued on. The use that was to be made of the land was not specified in the lease, though real estate may be occupied for many purposes. . . . The evidence in the record shows that the land in question had no rental value for other than

brick purposes. Therefore such a use was the only reasonable one to which the lessee could put it. The evidence objected to was not admitted to add to, take from, or to change in any respect the language of the writing. . . . In view of the fact that the particular use to which the land was to be put by the lessee was not mentioned in the lease, it was proper to admit evidence tending to show that the parties intended the land should be used for brick-making purposes."

A farm lease silent on the duration of the tenancy may be explained by parol evidence. *Brincefield v. Allen*, 25 Tex Civ App 258, 60 SW 1010.

The court stated as follows: "The contract sued on in this case does not show the length of time for which the premises were leased, and either party could allege and show by parol the agreement as to how long the contract was to continue, if there was such an agreement, and if there was no express agreement on this subject, evidence as to custom and usage would be admissible under proper allegations." *Pine Beach Investment Corp. v. Columbia Amusement Co.* 106 Va 810, 56 SE 822.

In allowing proof by parol to clear up an ambiguity in a lease, one court summarized the rule as follows:

"If . . . the language employed be fairly susceptible of either one of the two interpretations contended for, without doing violence to its usual and ordinary import, or some established rule of construction, then an ambiguity arises, which extrinsic evidence may be resorted to for the purpose of explaining. This is not allowing parol evidence for the purpose of varying or altering the contract, or of putting a different sense and construction upon its language from that which it would naturally bear, but for the purpose of showing the circumstances under which the language was used, and applying it according to the intentions of the parties." *Balfour v. Fresno Canal & Irrig. Co.* 109 Cal 221, 41 Pac 876.

In another instance, a court allowed use of parol evidence to show the intention of the parties in use of the term "proceeds," and whether the intent was to designate net or gross proceeds. *Millett v. Taylor*, 26 Cal App 161, 146 Pac 42.

Where a lease provided that one of the parties is to surrender possession of the premises at the end of the term "in the same condition as they now are," it was held proper

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to allow parol proof to show that the word "now" was referable to the beginning of the term. *Chesapeake Brewing Co. v. Goldberg*, 107 Md 485, 69 Atl 37.

"Ambiguities on the face of the instrument always make it permissible to show by parol the situation, the surrounding circumstances and the subsequent conduct of the parties, for the purpose of ascertaining their meaning and giving effect to their intention." *Tate v. Cody-Henderson Co.* 11 Ala App 350, 66 So 837.

The distinction between use of parol to modify a written instrument, and its use to clarify an ambiguity, is well summarized in the following holding:

"There is a distinction between a present lease and an executory contract to make a lease in the future. Whether a contract contained in a written instrument, or in letter between the parties, is of the one character or the other, depends upon the intention of the parties. This intention is primarily to be drawn from the writing itself; and if the written contract clearly and unambiguously shows the intention of the parties to be of the one character or of the other, it is conclusive. But if the written contract is ambiguous, or so lacking in clearness as to be open to construction by the aid of circumstances, such circumstances, including the construction placed upon such contract by the parties very shortly after it was made may be proved to aid in its correct interpretation, but not to add to or take from the writing, if the latter is, in itself, complete." *Andrews v. Stulb*, 145 Ga 826, 90 SE 59.

Parol evidence has been admitted in many instances to fill in gaps in the lease, as by furnishing details upon a matter that is essential to performance of the lease, but upon which the parties did not express their intention in the written instrument. *McColl v. Bear Creek Coal Min. Co.* 162 Iowa 491, 143 NW 532, where it was stated:

"Plaintiffs offered parol evidence, which was received subject to objection as to certain statements by the lessees during the negotiations for the new lease, and at the time of its execution, that they would commence developing the mine on plaintiff's land as quick as they got the machinery there, and would prosecute the work after it began to take out coal; that, if they took the contract, they would develop

the coal field at once; that, if they did not take this contract they could not develop the field at once. The objection to this evidence was that it was incompetent and tended to vary the terms of the written contract. The writing did not specify any time for developing the mine, or the diligence with which mining should be carried on after it was developed, further than the provision that work on development should commence within ninety days from the date of the contract. The contract being silent as to how mining should be carried on after it was developed, and when coal should be taken out, the evidence did not vary any of the terms of the writing. And we think the evidence was competent on the question of inducement to the execution of the second contract and the surrender of the first one, and to show what was contemplated by the parties when the lease was entered into."

Parol evidence may not be introduced to vary or in any way modify the plainly expressed description of premises in a written lease. *Brown v. Schiappacasse*, 115 Mich 47, 72 NW 1096; *Morris v. Kettle*, 57 NJL 218, 30 Atl 879; *Michels v. Studnitz*, 103 NY Supp 817.

It is not, for example, proper to allow parol evidence to show that additional premises, or portions of property, are to be included in the lease. *Haycock v. Johnson*, 81 Minn 49, 83 NW 494.

Similarly, it has been held that the provisions of a lease may not be enlarged by oral proof that additional means of access are included within the purview of the agreement. *Schulte Realty Co. v. Pulvino*, 179 NY Supp 371.

Thus, it was stated in a case where the lease covered rental of a portion of basement premises:

"The claim that the tenant is entitled to access to the store on the ground floor seems to me without merit. The lease under which the tenant now holds is silent as to such right, and the trial justice correctly excluded evidence that, in an earlier lease, there was an express provision for such access. The tenant had a right to demand that his access to the hall of the building be not interfered with, but I cannot find that there was an implied covenant in his lease that other premises in the building should likewise have access to this hall." *Schulte Realty Co. v. Pulvino*, 179 NY Supp 371.

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It is clear, however, that while oral proof may not modify a provision in a lease defining the property subject to the agreement, such proof is admissible to explain a contradiction or inconsistency regarding the description, or to clarify any ambiguity in the lease. Annotation: 25 ALR 829.

Thus, the abstract term "house" in a lease may be more precisely defined by oral proof. *Eastman v. Perkins*, 111 Mass 30.

As stated in one case involving an insufficient description of property:

"The parol evidence that was admitted was competent and allowable for the purpose of identifying the subject matter of the contract, of proving the defendant's acceptance of the lease, and his occupation as lessee, and also of proving that the 'house' was a small building connected with and appurtenant to the stable, intended for the occupation of the person having charge of the horses." *Eastman v. Perkins*, 25 ALR 831.

Elsewhere it is held that the "question whether a particular place is a part of the demised premises does not depend exclusively upon the question of boundary, but also upon the question of intention, which may be determined by bringing in aid of the words of the demise such extrinsic facts explanatory of the subject and of the rights of the parties as may show the meaning of the instrument and the intention of the parties." Annotation: 25 ALR 832.

According to some authorities, parol evidence may establish an independent, collateral agreement placing other property under lease between the same parties. *Armstrong v. Cavanagh*, 183 Iowa 140, 166 NW 673, 25 ALR 784.

For example, where a written lease of an apartment contained the following clause:

"An extra charge of \$5. per month without heat and \$7.50 per month with heat per car in the garage," it was competent for the lessee to show an oral agreement of room in the garage for a car of the lessee, upon the theory that this was proof of a "contemporaneous, collateral agreement not purporting to be included in the written agreement," and hence did not vary the terms of the written agreement. *Armstrong v. Cavanagh*, 183 Iowa 140, 166 NW 673, 25 ALR 784.

In another instance a farmer leased property described as

follows: "A dwelling house, stable, garden, potato patch, about 40 acres of land to be sown in oats," and it was held competent to show by parol the precise property covered by this description. *Elliott v. Abell*, 39 Mo App 346.

As stated by the court: "As the contract did not designate which particular tracts were intended, it was necessary and perfectly competent, under the well-established rules, for plaintiff to identify and locate the particular land intended by the introduction of extrinsic evidence." *Elliott v. Abell*, 39 Mo App 346.

In another case, in commenting upon the meaning of the term "appurtenances," used in a lease, with no additional description thereof, the court held:

"As the appurtenances were not specified, parol evidence was admissible to show their character and extent; and that being so, parol evidence was admissible to show that the parties, preparatory to the execution of the lease, met and discussed such character and extent, and agreed that the appurtenances should include all that they appeared to include, and that the defendant would not make a change in such appearances in derogation of his grant, and that, in strict reliance upon the promise of the defendant not to change the appurtenances as they then existed, and were understood, the plaintiff executed the lease." *Lynch v. Hunneke*, 19 NY Supp 718.

Courts have in some instances allowed oral testimony to develop a collateral and independent agreement from that expressed in the lease. *Lewis v. Seabury*, 74 NY 409, 30 Am Rep 311; *Schweig v. Manhattan Leasing Co.* 54 Misc 233, 104 NY Supp 371; *Suderman-Dolson Co. v. Rodgers*, 47 Tex Civ App 57, 104 SW 193.

Thus, in one case it was held proper for the lessee to show that in consideration of his purchase of certain property belonging to the lessor, and his rental of a hotel, the lessor orally agreed not to conduct a hotel in the same city during the duration of the lease. *Welz v. Rhodius*, 87 Ind 1, 44 Am Rep 747.

Some courts have been reluctant to allow the use of parol evidence to establish an agreement collateral to the lease, and independent thereof. *Jones v. Sargent*, 193 Iowa 1256, 188 NW 818; *Stoddard v. Nelson*, 17 Or 417, 21 Pac 456.

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Thus, it has been ruled that "where the negotiations for a lease of real estate result in a written contract, a previous oral agreement, not expressed in the writing, relating to repairs to be made to the building let, and also that trade fixtures subsequently to be put in by the tenant should become the property of the landlord on the termination of the lease, is not such a collateral agreement relating to a subject distinct from that to which the written contract applies as to justify the admission of proof thereof to vary the written contract which the parties have entered into. Agreements to repair the demised premises, and the condition in which they are to be left at the termination of a lease, in contracts of letting, are collateral to the demise of the land, and not to a subject distinct therefrom." *Soulier v. Daab*, 85 NHL 681, 90 Atl 266.

The consideration expressed in a lease may not be modified by parol proof. *Armstrong v. Union Trust Co.* 113 Ark 509, 168 SW 1119; *McMullen v. Moffitt*, 68 Ill App 160; *Kelly v. Chicago, M. & St. P. R. Co.* 93 Iowa 436, 61 NW 957.

As stated in one case: "The contract of lease is perfect in all its parts, . . . The consideration for the benefit derived is expressed in the lease and is no more subject to parol modification than any other condition therein contained. The rule is elementary that, where a contract is reduced to writing, the writing affords the only evidence of the terms and conditions of the contract. All antecedent and contemporaneous verbal agreements are merged in the written contract. The law will not allow that an agreement, in such case, may rest partly in writing and partly in parol. So that it is equally inadmissible to add to, take from, or specifically change the terms of a written agreement by parol. . . . When a contract of lease is explicit, it is not competent to show by parol that more or less rent was agreed upon, or that other rights and privileges than those named in the lease were given, or, indeed, to aid in its construction." *Kelly v. Chicago, M. & St. P. R. Co.* 93 Iowa 436, 61 NW 957.

The distinction between cases where evidence by parol of consideration is inadmissible and those where it may be used, is well summarized in the following:

"Where a recital of the consideration received is put in a written contract, and amounts only to an acknowledgment of the payment thereof, parol evidence as to the true considera-

tion is admissible, although it may tend to vary the writing in that respect. But when the statement of the consideration is itself an operative part of a contractual act, as when in the same writing the parties set out their mutual promises as consideration for each other, here the word 'consideration' signifies a term of the contract, and parol evidence is not admissible to alter or contradict it." *Reed v. Moore*, 54 Okla 354, 154 Pac 348.

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LEASE, REFORMATION DUE TO MISTAKE IN

- Q—You are the plaintiff in this action?
- Q—Did you, sometime during the month of November 1943, have any conversations with the defendant regarding rental of 456 Main Street? A—I did.
- Q—Do you recall the date of these conversations?
- Q—Where were they held?
- Q—Based upon these conversations, did you thereafter enter into a written lease with the defendant?
- Q—I show you a written instrument and ask if this is the lease you refer to?
- Q—Is that your signature upon the lease?
- Q—Did you see the defendant sign this lease?
- Q—Is this his signature?
- (Offered in evidence.)
- Q—I now ask you to read Clause 4, relating to the description of the property, and ask if that correctly reflects the substance of your conversations with the defendant, as they described the property to be leased?
- Q—Will you now tell us, as near as you can recall, the substance of your conversations with respect to the property involved?
- (Where it is sought to show a mutual mistake in reducing an oral agreement to writing, all aspects of the oral agreement should be fully developed, and all proof in support thereof made available for use at the trial.)
- (Who drew the lease, at whose request, upon what data, and under what circumstances?)
- Q—Did you, in reliance upon these conversations, enter into the written lease? A—Yes.

The broad rule is well settled that where there exists a mutual mistake in regard to the subject matter of a lease, equity will grant relief to either party. *Hannah v. Steinman*, 159 Cal 142, 112 Pac 1094; *Hoops v. Fitzgerald*, 204 Ill 325, 68 NE 430; *Muhlenberg v. Henning*, 116 Pa 138, 9 Atl 144; *Virginia Iron, Coal & Coke Co. v. Graham*, 124 Va 692, 98 SE 659; *Bluestone Coal Co. v. Bell*, 38 W Va 297, 18 SE 493.

“Parties to an agreement may be mistaken as to some mate-

rial fact connected therewith, which formed the consideration thereof or inducement thereto, on the one side or the other; or they may simply make a mistake in reducing their agreement to writing. In the former case, before the agreement can be reformed, it must be shown that the mistake is one of fact, and mutual; in the latter case it may be a mistake of law or of fact. Equity interferes, in such a case, to compel the parties to execute the agreement which they have actually made." *Pitcher v. Hennessey*, 48 NY 415.

Mutual mistake may embrace a wide variety of errors. Thus, it has been held that equity will intervene where the lease specifies property other than that intended by the parties. Annotation: 26 ALR 475.

But the mere fact that one of the parties thought he was securing a larger piece of property than that specified in the lease is not sufficient to avoid the agreement. *Ward v. Philadelphia*, 3 Sadler(Pa) 233, 6 Atl 263.

A misapprehension as to the extent or nature of title on the part of one of the parties is similarly not sufficient to justify equitable intervention. *Ward v. Philadelphia*, 3 Sadler(Pa) 233, 6 Atl 263.

As stated in this connection: "A lease given in good faith by one party and accepted by another with his eyes open is valid and binding on both. The mere fact that the tenant has a better title than his landlord does not of itself raise the presumption that the lease was a fraud, or accepted by mistake." *Ibid*.

A mutual mistake in including within the purview of the lease property not owned by the lessor, and which was essential to the use contemplated by the lessee, may form the basis for equitable intervention. *Marmet Co. v. Cincinnati*, 32 Ohio CC 555, affirmed 85 Ohio St 469, 98 NE 1121.

Similarly, equity will set aside a lease where both parties were mistaken in their understanding of the nature of the property embraced within the lease, as where the parties covenanted for erection of additional stories upon the existing property, not knowing at that time that the foundation of the building did not permit such construction. *Hoops v. Fitzgerald*, 204 Ill 325, 68 NE 430, where the court stated:

"That there was a mutual mistake as to the condition of the walls and foundations of the building, and that but for such

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mistake the lease would not have been made, as well as that this mistake was as to a material and important matter affecting the substance of that concerning which the contract was, and the contract itself, there was such evidence that we ought not to overturn the conclusions of the chancellor upon the facts in dispute."

A mistake brought about by the superior knowledge or position of one of the parties may also lead to equitable relief. An instance of this situation is where an attorney has dealings with a layman. Annotation: 26 ALR 479.

"The testimony as to the alleged mistake in the lease was sufficient to justify the trial court in decreeing its reformation. Defendant could neither read nor write. He had great confidence in plaintiff, and for more than ten years had advised and counseled with him in all business matters in which he was interested. He relied upon plaintiff's preparing a lease which would fully represent their previous negotiations. There is no doubt that both understood defendant should have the right to remove all improvements by him placed upon the land prior to the time plaintiff acquired title thereto. By mistake this lease did not express their agreements, and it should be reformed so as to do so. It may be that plaintiff labored under no mistake in having the lease prepared as he did, but he knew what defendant understood its terms were to be, and took advantage of his relations with the defendant to obtain a more favorable contract than he was entitled to. In such cases equity will afford relief." *Daly v. Simonson*, 126 Iowa 716, 102 NW 780.

The rule here was stated as follows:

"While mistakes of the law cannot usually be made the ground of relief, yet in numerous instances mistakes of persons as to their own private rights and liabilities may be regarded and dealt with as mistakes of fact. And when the mistake has been brought about by someone possessed of superior knowledge, in whom trust has been reposed, a case is made for the intervention and relief of a court of equity. It is true in this case no very close relations between appellant and appellee, matured by time and developed in many transactions, were shown by the evidence, yet the confidence of the layman in the wisdom and legal knowledge of an attorney may be of the highest order and deepest nature, without the

latter having ever transacted business for the other; such confidence being caused by the reputation of the attorney for probity, honesty, and learning in the community." *Ibid.*

Parol evidence is admissible to show that the minds of the parties did not meet, and that in entering upon the agreement they committed a mutual mistake, affecting the essence of their agreement. *Bedell v. Wilder*, 65 Vt 406, 26 Atl 589, 36 Am St Rep 871, holding:

"The parol evidence was properly admitted, not to vary the terms or the effect of the contract, but to show that it never took effect as a valid agreement. The claim was not based upon the lease, but upon a fact back of it, the mutual mistake of the parties, which led to the execution of it and the assignment. The plaintiff is not estopped from asserting this claim against the defendant. It is true he had constructive notice of the limitation upon the water rights, as the deed limiting them was upon record; but the defendant had taken the water to the pulp mill and had leased it in connection with the mill, and the plaintiff might well infer, without actual notice, that there was no limit or restriction upon the water rights."

Equity will also intervene where the parties had orally agreed upon the terms and conditions of the lease, but through a mutual mistake in reducing such agreement to writing, did not sign an instrument effectively evidencing the character of their agreement. *Reed v. Root*, 59 Iowa 359, 13 NW 323; *Silbar v. Ryder*, 63 Wis 106, 23 NW 106.

A court of equity has the power to reform an instrument in the case of a mutual mistake in reducing an agreement to writing. *Wales-Riggs Plantations v. Banks*, 101 Ark 461, 142 SW 828; *Kelly v. Galbraith*, 186 Ill 593, 58 NE 431; *Schall v. Schwartz*, 181 App Div 397, 168 NY Supp 1048; *Gimbel Bros. v. Tolman*, 161 Wis 382, 154 NW 628.

In *Philippine Sugar Estates Development Co. v. Philippine Islands*, 247 US 385, 62 L ed 1177, it was pointed out that "courts of equity will reform a written contract where, owing to mutual mistake, the language used therein did not fully or accurately express the agreement and intention of the parties. That fact that interpretation or construction of a contract presents a question of law, and that, therefore, the mistake was one of law, is not a bar to granting relief."

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In *Pitcher v. Hennessey*, 48 NY 415, it was held: "When parties have made an agreement, and there is no allegation of any mistake in it, and, in reducing it to writing, they, by mistake, either because they did not understand the meaning of the words used, or their legal effect, failed to embody their intention in the instrument, equity will grant relief by reforming the instrument, and compelling the parties to execute and perform their agreement as they made it; and it matters not whether such a mistake be called one of law or of fact."

The rule in this connection has been stated to be "that whenever it clearly appears that a written instrument, drawn professedly to carry out the agreement of the parties previously entered into, is executed under the misapprehension that it really embodies the agreement, whereas, by a mistake of the draftsman, either as to fact or law, it fails to fulfil that purpose, equity will correct the mistake by reforming the instrument in accordance with the previous agreement. True, the mistake which may be thus corrected in such a writing must be mutual; that is, such a mistake in the drafting of the writing as makes it cover the intent or meaning of neither party to the contract. To entitle the party to a reformation of the contract, he must prove that it was the intention of both parties to make a contract such as he seeks to have established, and that this intention was frustrated, either from some fraud, accident, or mutual mistake of the parties." *Day v. Dyer*, 171 Iowa 450, 152 NW 53.

The claim of a mistake in reducing an agreement made orally to writing is not negatived by the fact that both parties read the agreement before signing same. *Brown v. Ward*, 119 Iowa 604, 93 NW 587.

In denying such effect from the reading of the instrument, it was stated:

"The mere fact that the writing was read over to and understood by the parties at the time they signed it is not controlling against such a claim. If the language, even though it be that selected by the parties, when given a legal construction, fails to express or defeats their mutual intent and agreement, equity will reform it." *Brown v. Ward*, 119 Iowa 604, 93 NW 587.

A sharp distinction should be drawn between the mutual mistake of the parties in their understanding of the legal ef-

fect of a phrase or clause in an agreement, and those mutual mistakes which are referable solely to a variance between an oral agreement and the written evidence thereof. *Morris v. Kettle*, 56 NJ Eq 826, 34 Atl 376.

Thus, in one case where the court denied an application for modification of a lease, it pointed out:

"There is no question upon complainant's own evidence, that the real mistake sought to be relieved against is not that the lease as drawn did not contain in this particular the precise agreement which the parties intended it should contain for the purpose of carrying out their alleged previous parol agreement, but that the expression or phrase in the written contract intentionally adopted for the purpose of carrying this alleged previous intention did not do so. Such a mistake would seem to be a clear mistake of law as to the construction of a written contract, and therefore to come within the class of cases which the court of equity does not generally relieve against." *Morris v. Kettle*, 56 NJ Eq 826, 34 Atl 376.

The proof should be clear and explicit in establishing the fact of a mistake; mere conjectures and speculations are insufficient. *Tyson v. Chestnut*, 100 Ala 571, 13 So 763; *Kelly v. Galbraith*, 186 Ill 593, 58 NE 431; *Schultz v. Lidtka*, 179 Iowa 652, 161 NW 682; *Miles v. Shreve*, 179 Mich 671, 146 NW 374; *Schall v. Schwartz*, 181 App Div 397, 168 NY Supp 1048.

A wide variety of expressions have been used by the courts in defining the nature of this requirement. According to some, the proof must be "clear and satisfactory," other courts define the need in terms of "clear, positive and convincing" evidence, and some go so far as to require proof which leaves "no reasonable doubt." Annotation: 26 ALR 498.

A concise and practical summary of the law in this respect is contained in the following holding:

"In an action for the reformation of a written instrument upon the ground of mistake, the party seeking the reformation must prove that there was a mistake, by evidence that is clear, positive, and convincing. It is to be presumed that the written instrument was carefully and deliberately prepared and executed, and therefore is evidence of the highest character, and will be regarded as expressing the intention of the parties to it until the contrary appears in the most satisfactory manner. The grade and degree of proof required

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to entitle a plaintiff to relief of this character have been many times considered by the courts of England, the Federal and the various state courts of the United States, and their decisions as to the nature of the proof required show that it must be of the most substantial and convincing character." *Christopher & T. Street R. Co. v. Twenty-Third Street R. Co.* 149 NY 51, 43 NE 538.

It is further essential that the mistake be mutual in character for equity to intervene. A misapprehension on the part of one of the parties to the agreement as to the nature and content thereof, not induced by any acts on the part of the other party, is not sufficient to satisfy the requirement of mutual mistake. *Habbe v. Viele*, 148 Ind 116, 45 NE 783; *Pastorino v. Palmer*, 163 Mich 265, 128 NW 188; *Hackett v. View*, 109 App Div 351, 95 NY Supp 675; *Bruce v. Grays Harbor Drug Co.* 68 Wash 688, 123 Pac 1075.

"It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission." *Upton v. Tribilcock*, 91 US 50, 23 L ed 205.

"Three things are necessary to justify the reformation of a written instrument upon the ground of a mistake: First, that the mistake be one of fact, and not of law; second, that the mistake be proved by convincing and clear evidence; and, third, that the mistake was mutual and common to both parties to the instrument. . . . A reformation can only be had upon clear proof that the alleged mistake was mutual, and the proof must be such as to leave no fair and reasonable doubt upon the mind that the instrument does not embody the final intention of the parties, but was executed under a common mistake, and expresses what neither of the parties intended." *Silurian Oil Co. v. Neal*, 277 Ill 45, 115 NE 114.

"To reform an instrument for a mistake in writing it, it must be shown that the reform sought is according to the agreement of both parties at the time the instrument was written and the mistake made. When an instrument is written as one party understands it, and not as the other party

understands it, there is no ground for reform. A reformation cannot make a new instrument which the parties never agreed to make." *Welshbilligg v. Dienhart*, 65 Ind 94.

Elsewhere it has been stated that a lease "carries the strong presumption that it expresses the terms agreed upon between the parties to it, and ought not to be reformed, except when it clearly and satisfactorily appears that there has been a mutual mistake, or a mistake on the part of the plaintiff, accompanied by fraud upon the part of the defendant, or by such acts on his part as would clearly be inequitable between the parties." *Kleinsorge v. Rohse*, 25 Or 51, 34 Pac 874.

LIBEL OR SLANDER ACTIONS, PROOF OF SPECIFIC ACTS

The decisions are generally agreed that a defendant in a libel or slander action cannot, for the purpose of mitigating damages, introduce evidence of specific acts of misconduct on the part of the plaintiff. *Sun Printing & Pub. Asso. v. Schenck*, 98 F 925; *Hearne v. De Young*, 132 Cal 357, 64 Pac 576; *Swift v. Dickerman*, 31 Conn 285; *Waples v. Burton*, 2 Harr 446; *Tolleson v. Posey*, 32 Ga 372; *Regnier v. Cabot*, 7 Ill 34; *Iles v. Inter Ocean Newspaper Co.* 184 Ill App 63; *Hallowell v. Guntle*, 82 Ind 554; *Mills v. Flynn*, 157 Iowa 477, 137 NW 1082; *Register Newspaper Co. v. Stone*, 31 Ky L Rep 458, 102 SW 800. 11 LRA(NS) 240; *Kendrick v. Kemp*, 6 Mart (NS) 500; *Pattangall v. Mooers*, 113 Me 412, 94 A 561, LRA 1918E 14, Ann Cas 1917D 689; *Shilling v. Carson*, 27 Md 175, 92 Am Dec 632; *McLaughlin v. Cowley*, 131 Mass 70; *Randall v. Evening News Asso.* 97 Mich 136, 56 NW 361; *Thibault v. Sessions*, 101 Mich 279, 59 NW 624; *Davis v. Hamilton*, 88 Minn 64, 92 NW 512; *Lydiard v. Daily News Co.* 110 Minn 140, 124 NW 985, 19 Ann Cas 985; *Vanloon v. Vanloon*, 159 Mo App 255, 140 SW 631; *Knight v. Foster*, 39 NH 576; *Fodor v. Fuchs*, 79 NJL 529, 76 A 1081; *Cudlip v. New York Evening Journal Pub. Co.* 180 NY 85, 72 NE 925; *Abell v. Cornwall Industrial Corp.* 241 NY 327, 150 NE 132, 43 ALR 880; *Wuensch v. Morning Journal Asso.* 4 App Div 110, 38 NYS 605; *Bergstrom v. Ridgeway Co.* 138 App Div 178, 123 NYS 29; *Richards v. Bieber*, 166 Misc 91, 1 NYS(2d) 442 (affirmed without opinion in 254 App Div 832, 6 NYS (2d) 160); *Vick v. Whitfield*, 3 NC (2 Hayw) 222; *Fisher v. Patterson*, 14 Ohio 418; *Stewart v. Press Co.* 1 Pa Co Ct 247 (reversed on other grounds 119 Pa 584, 14 A 51); *Folwell v. Providence Journal Co.* 19 RI 551, 37 A 6; *Randall v. Holsenbake*, 21 SCL (3 Hill) 175; *Bell v. Farnsworth*, 11 Humph 608; *Bowen v. Hall*, 20 Vt 232. Annotation: 130 ALR 859.

"It is not permissible for a plaintiff to give evidence of particular facts in support of his claim to have a good character, nor is it open to a defendant to give evidence, or to cross-examine as to particular instances with the object of diminishing the damages." *Theodore v. Daily Mirror*, 282 NY 345, 26 NE(2d) 286, 130 ALR 853.

Thus, the fact that the plaintiff has committed offenses other than those which the defendant has imputed to him,

or offenses of a similar character, may not be shown in mitigation of damages. *Ridley v. Perry*, 16 Me 21.

In *Fisher v. Patterson*, 14 Ohio 418, where the libel charged was that the plaintiff had stolen personal property from his former employer, it was held that the evidence of particular acts of dishonesty, such as that he had been guilty of swindling his deputies while serving as a United States Marshal, was inadmissible in mitigation of damages.

In *Schieffelin v. Hylan*, 178 NYS 652 (affirmed without opinion in 190 App Div 903, 179 NYS 949), where the libel charged plaintiff with having manufactured and sold habit-forming drugs, it was held that defendant could not plead in mitigation of damages an alleged infraction of the Federal Insecticide Law.

The proof should be specifically directed to establishing character by general repute, or common repute, as distinguished from specific acts. *Davis v. Hamilton*, 88 Minn 64, 92 NW 512.

It is immaterial in this connection that the general issue alone was pleaded, or that truth of the publication was set forth in the pleadings. *Bowen v. Hall*, 20 Vt 232.

The theory upon which this rule is based is that a plaintiff is presumed to be ready, at all times, to sustain and support his general character, but not to disprove, without notice, particular facts. *Shilling v. Carson*, 27 Md 175, 92 Am Dec 632.

In some instances, where the plaintiff himself has testified to his good character on direct examination, courts have allowed defendants to bring out on cross-examination, in mitigation of damages, proof of specific acts of misconduct. (*Wuensch v. Morning Journal Association*, 4 App Div 110, 38 NY Supp 605).

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LIBEL OR SLANDER, REPETITION OF, LIABILITY OF AUTHOR

Q—What is your occupation? A—Editor of the Westville Courier, a daily newspaper.

Q—Did you, on or about the 8th day of October, 1943, attend a meeting of the Easton County Republican Committee?
A—I did.

Q—Do you recall seeing the defendant at this meeting? A—Yes.

Q—Do you recall hearing any speech or remarks made by the defendant from the platform?

Q—Will you now tell us whether you recall any mention being made by the defendant of the plaintiff?

Q—Please tell us the substance of those remarks, as near as you can now recall.

Q—Did you subsequently have any conversation with the defendant, respecting his remarks about the plaintiff?

Q—Will you tell us the nature of that conversation. A—He gave me a typewritten copy of his speech, and asked me to publish same.

(Where the author of the actionable matter can be shown to have participated in, or directed or authorized, the repetition of the libel or slander, he may be held liable for any damages resulting from the repetition. See text).

There is authority for the view that one who publishes or originates a libel is not responsible for the unauthorized and voluntary repetition of the libel by another. *Turner v. Hearst*, 115 Cal 394, 47 Pac 129; *Burt v. Advertiser Newspaper*, 154 Mass 238, 28 NE 1, 13 LRA 97; *McDuff v. Detroit Evening Journal Co.* 84 Mich 1, 47 NW 671, 22 Am St Rep 673; see also cases collected in 16 ALR 727.

In accordance with this view, it has been held that the author of a libel is not liable in damages for the enhancement of the injury done to the person mentioned in the libelous matter due to a republication of the libel, done without the consent or direction of the author. *Maytag v. Cummins*, 260 Fed 74, 171 CCA 110; *Turner v. Hearst*, 115 Cal 394, 47 Pac 129; *Burt v. Advertiser Newspaper*, 154 Mass 238, 28 NE 1, 13 LRA 97; *McDuff v. Detroit Evening Journal Co.* 84 Mich

1, 47 NW 671, 22 Am St Rep 673; see also cases collected in 16 ALR 727.

In one instance, it was held error in an action for a libel appearing in a newspaper to admit proof of subsequent republication in another journal. *McDuff v. Detroit Evening Journal Co.* 84 Mich 1, 47 NW 671.

A similar rule has been applied in the case of repetition of a slander, it being held that the author of same is not liable for damages caused through the acts of others in circulating the slanderous matter. *Maytag v. Cummins*, 260 Fed 74, 171 CCA 110; *Terwilliger v. Wands*, 17 NY 54, 72 Am Dec 420.

"It is too well settled to be now questioned that one who utters a slander is not responsible, either as on a distinct cause of action or by way of aggravation of damages of the original slander, for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby make themselves liable to the persons slandered, and that such repetition cannot be considered in law a necessary, natural, or probable consequence of the original slander." *Hastings v. Stetson*, 126 Mass 329, 30 Am Rep 683.

In another case, it was pointed out that ordinarily, "the repetition of defamatory language by another than the first publisher is not a natural, consequence of the first publication, and therefore, generally, the loss resulting from such repetition does not constitute special damage, and is not attributable to the first publisher. This rule results from the principle that everyone who repeats a slander is responsible for the damage caused by such repetition, and such damage is not the proximate and natural consequence of the first publication of the slander. But if the slander be repeated under such circumstances as to be justifiable and innocent, and not to give a cause of action against the one repeating the same, then the first publisher thereof is generally responsible for the damage caused by such repetition." *Bassell v. Elmore*, 48 NY 561.

The distinction between republication of a libel and slander has been summarized as follows:

"Evidence of repetition by third persons without the request of the originator, and of rumors and reports of the scandal, is, as to the substance and form of the alleged slander, hearsay, or hearsay of hearsay, and it falls under the ban of

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the rule against hearsay, while the form and substance of a libel are legally evidenced by the writing or print that contains it. The injurious natural and probable consequences of slander are far less than those of libel. Slander is but the utterance of words. That utterance is ordinarily made in the hearing of one or of a few persons. That utterance is often—it is probably not too much to say that it is generally—made in private, in confidence, in the faith that it will not be, and the intention that it shall not be, repeated. This belief and intention are not without foundation in reason and in law. It is an illegal act to repeat a slander, an act for the damages from which the victim of the repetition may maintain an action against the repeater. The basic legal presumption on which law and the general action of mankind are based is that men will refrain from unlawful acts, will obey the law, and discharge their duties, and the great majority do so. So it is that the legal presumption is that a slander will not be repeated, and that its unauthorized repetition, and current rumors and reports of it, and the damages therefrom, are not to be anticipated by the originator, and are not the natural or probable consequences thereof. But the proximate cause of such damages is the illegal intervening repetition, or the making by third persons of the current reports and rumors, which turn aside the natural sequence of events and isolate the damages from the unauthorized repetition from those from the original slander. Again, a slander is preserved in no fixed or permanent form. It ordinarily soon fades out and is forgotten like the sound that carries it. But one who publishes a libel in a newspaper or pamphlet which circulates among many people, or even in a private letter, thereby places it in permanent form where it will be more likely to continue in existence and to be read by many people, and where he causes it to be published in a newspaper or magazine he thereby evidences his intention that the readers shall read it, so that the natural and probable effect of publishing a libel is far more permanent, extensive, and injurious to the victim than the mere speaking of the words it contains to one or more persons. These striking differences in the line between material and immaterial evidence in actions of libel and slander, and in the difference between the natural and probable consequences of them, are evidenced in the decisions of the courts

and in the textbooks." *Maytag v. Cummins*, 260 Fed 74, 171 CCA 110.

In the event that the utterer of a slander commits the wrong in the presence of a third party, who thereafter communicates same to a newspaper which publishes the slander, it has been held that the original wrongdoer is not liable for the subsequent publication. *Schoepflin v. Coffey*, 162 NY 12, 56 NE 502.

As stated: "It is too well settled to be now questioned that one who utters a slander, or prints and publishes a libel, is not responsible for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control and who thereby make themselves liable to the person injured, and that such repetition cannot be considered in law a necessary, natural, and probable consequence of the original slander or libel. . . . The remedy in such a case would be against the party who printed and published the words thus spoken, and not against the one speaking them, as a person is not liable for the independent illegal acts of third persons in publishing matters which may have been uttered by him, unless they are procured by him to be published, or he performed some act which induced their publication. . . . The repetition of defamatory language by another than the first publisher is not a natural consequence of the first publication and therefore the loss resulting from such repetition is not generally attributable to the first publisher. This rule is based upon the principle that every person who repeats a slander is responsible for the damage caused by such repetition, and that such damage is not the proximate and natural consequence of the first publication of the slander." *Schoepflin v. Coffey*, 162 NY 12, 56 NE 502.

According to some authorities, the author of a libel may be held liable for damages due to repetition of the libelous matter, where such repetition is shown as a natural and probable consequence of the publication. *Howe v. Bradstreet Co.* 135 Ga 564, 69 SE 1082; *Bigley v. National Fidelity Co.* 94 Neb 813, 144 NW 810; *King v. Patterson*, 49 NJL 417, 9 Atl 705, 60 Am Rep 622; see also 16 ALR 734.

Thus, in one case, it was stated that where "one publishes a libel in a newspaper, and, without his knowledge, a third person cuts the libel from the paper, and sends it to another

person, the first is responsible for its being so sent, if the sending it was a natural consequence of its publication in the newspaper, of which the jury are to judge." *Zier v. Hoffin*, 33 Minn 66, 21 NW 862, 53 Am Rep 9.

Similarly, there is authority for the view that the author of a slander is liable for the repetition of the slanderous remarks by a third person. *Fitzgerald v. Young*, 89 Neb 693, 132 NW 127; *Nott v. Stoddard*, 38 Vt 25, 88 Am Dec 633.

"It is a general principle that everyone is responsible for the natural and necessary consequences of his acts. And it well may be that the repetition of a slander may be the natural consequence of the defendant's original publication. . . . We think it may be said with reason in this case that the repetition of the slander by those to whom it was uttered, and after that by others, may be regarded as fairly within the contemplation of the original slander, and a consequence for which the defendant may be held responsible." *Davis v. Starrett*, 97 Me 568, 55 Atl 516.

LITERARY PROPERTY, INFRINGEMENT OF
(See Copyright or Literary Property, Infringement of)

MALICIOUS PROSECUTION, PROOF OF PROBABLE CAUSE

It is generally held that a judgment of conviction in favor of one prosecuting a civil action, rendered in a court of proper jurisdiction, is *prima facie* evidence of the existence of probable cause, notwithstanding that the judgment is subsequently reversed, unless it is shown that the judgment was procured by fraud, perjury, or undue means. *Casey v. Dorr*, 94 Ark 433, 127 SW 708, 21 Ann Cas 1046; *Smith v. Parman*, 102 Kan 787, 172 Pac 33; *Godner-Siegel Corp. v. Kraemer Hosiery Co.* 153 Misc 159, 274 NY Supp 681; *Kennedy v. Burbridge*, 54 Utah 497, 183 Pac 325, 5 ALR 1682. See also cases collected in 97 ALR 1025.

"We think the great weight of authority is to the effect that a conviction and judgment in a lower court is conclusive, but if not sustained on appeal, it can be impeached for fraud or other unfair means in its procurement." *Moore v. Winfield*, 207 NC 767, 178 SE 605, 97 ALR 1019.

"A judgment of conviction for larceny, although reversed on writ of error, and the accused discharged from further prosecution on remand of the case, is conclusive evidence of probable cause for believing the accused guilty of the offense charged to him, unless the conviction was procured by fraud; and on plaintiff in an action for malicious prosecution devolves the duty of averring and by convincing proof showing such fraud or other undue means." *Haddad v. Chesapeake & O. Ry. Co.* 77 W Va 710, 88 SE 1038, LRA1916F 192.

In one case it was held that a conviction for larceny, although reversed upon appeal and the defendant discharged from further prosecution, was conclusive evidence of probable cause for believing him guilty of the offense charged against him. *Haddad v. Chesapeake & O. Ry. Co.* 77 W Va 710, 88 SE 1038, LRA1916F 192.

"A conviction below, followed by an acquittal on appeal, does not establish the guilt of the person so convicted. So far from that being the fact, the contrary is the established law of *res judicata*. A conviction below is wiped out by the acquittal on appeal so far as the doctrine of *res judicata* is concerned. A conviction below followed by acquittal above on which final judgment is entered, establishes the innocence,

not the guilt, of the prisoner. Under these circumstances it is not necessary to go farther and point out (in the first place) that the parties to the criminal prosecution and those to the subsequent action for malicious prosecution are not the same, and (in the second place) that the issues tried in the criminal complaint and in the civil action for malicious prosecution are quite different." *Desmond v. Fawcett*, 226 Mass 100, 115 NE 280, LRA1917D 408.

It has been pointed out in several cases that the effects of a judgment as evidence of probable cause is weakened, if not destroyed, upon proof that the judgment was secured through fraud or other unlawful or undue means. *Casey v. Dorr*, 94 Ark 433, 127 SW 708, 21 Ann Cas 1046; *Smith v. Parman*, 102 Kan 787, 172 Pac 33; *Godner-Siegel Corp. v. Kraemer Hosiery Co.* 153 Misc 159, 274 NY Supp 681; *Kennedy v. Burbidge*, 54 Utah 497, 183 Pac 325, 5 ALR 1682. See also cases collected in 97 ALR 1025.

"On principle a defendant when sued for malicious prosecution ought not to be allowed to invoke for his protection upon the issue of probable cause a conviction by the inferior magistrate, when that conviction was procured by 'fraud, conspiracy, or subornation in its procurement'." *Desmond v. Fawcett*, 226 Mass 100, 115 NE 280, LRA1917D 408.

It is necessary in all cases involving probable cause in an action for malicious prosecution, to examine carefully the proof upon which the former trial was had, and the nature of the evidence therein submitted.

MAILING OF LETTER, PROOF OF

Q—Where are you employed? A—By the J. N. Adams Company, the plaintiff in this action.

Q—In what capacity are you employed there? A—As filing and mail clerk.

Q—Were you doing this work on January 30th, 1943?

Q—Please describe the nature of your duties as a filing clerk?
A—I assorted all letters, papers and documents, according to where they belonged, etc.

Q—What practice did you follow on January 30th, 1943, with respect to letters for mailing? A—I placed these letters in a mail chute in the outer hall.

Q—Do you recall whether you followed this custom on that date?

Q—What is there about January 30th, 1943, that impresses this date upon your mind?

(In the event the circumstances are such that the witness is able to recall a specific letter, this should be established.)

(The custom should be developed in some detail, showing where the letters are picked up, at what intervals, by how many different persons, where deposited, etc.)

(The proof should include testimony by all persons connected with the letter, from the author to the person making the actual deposit.)

The broad rule is well settled that the act of depositing a letter in a street mail box regularly maintained by the United States postal authorities, is the same as the deposit of a letter in a post office, with the same presumption of mailing. *Corry v. Sylvia y Cia*, 192 Ala 550, 68 So 891; *Boening v. North American Union*, 155 Ill App 528; *Hummelshime v. State*, 125 Md 563, 93 Atl 990; *Wood v. Callaghan*, 61 Mich 402, 28 NW 162; *Re Wiltse*, 5 Misc 105, 25 NY Supp 733.

“We judicially know that the Federal government provides and maintains iron mail boxes on street corners in cities for the convenient posting of letters, and it will be presumed, *prima facie*, that any ‘iron mail box’ thus located is a government box. It will be further presumed that a letter posted therein has been taken up in due course, carried to a government post office, and duly sent upon its way.” *Corry v. Sylvia y Cia*, 192 Ala 550, 68 So 891.

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It is, of course, essential that the deposit be in a box open for the reception of mail, regularly maintained for that purpose, and under the exclusive jurisdiction of the Post Office Department. *Corry v. Sylvia & Cia*, 192 Ala 550, 68 So 891; *Boening v. North American Union*, 155 Ill App 528; *Hummelshime v. State*, 125 Md 563, 93 Atl 990; *Wood v. Callaghan*, 61 Mich 402, 28 NW 162; *Re Wiltse*, 5 Misc 105, 25 NY Supp 733.

Similarly, it has been held that proof of deposit of a letter in a mail chute in a private building, is the same as a showing of deposit of the letter in a post office. *Hudson v. Grand Rapids & I. R. Co.* 203 Ill App 377; *Hummelshime v. State*, 125 Md 563, 93 Atl 990; *Wilson v. Peck*, 66 Misc 179, 121 NY Supp 344.

Where a person establishes delivery of a letter to a letter carrier in the regular course of his duties, this has been held sufficient proof of mailing. *Rosenthal v. Walker*, 111 US 196, 28 L ed 399; *Pearce v. Langfit*, 101 Pa 507, 47 Am Rep 737.

Thus, it has been stated in this connection: "The delivery of a letter to an official letter carrier is the full equivalent of depositing it in a receiving box, or at the post office. When left in the former it is for the purpose of being taken therefrom by the carrier, and if left at the post office it must be taken from the receptacle there provided for its deposit, either by the postmaster, or by some one of his agents, to be placed in the mail. In either case the letter must come into personal custody of someone lawfully authorized for the purpose, whose function it is to participate in the transmission of it from the sender to the mail. It certainly can make no difference whether the letter is handed directly to the carrier, or is first deposited in a receiving box and taken from thence by the same carrier." *Pearce v. Langfit*, 101 Pa 507, 47 Am Rep 737.

A question that occasions considerable conflict is that revolving around office custom or usage as a basis for establishing proof of mailing of a letter. Generally, it may be stated that it is essential to establish the following requisites in such cases:

- 1—The existence of a specific and regularly followed office custom, whereby letters left in a particular place are picked up, and deposited in a mail box, mail chute or post office, pursuant to a regular custom.

- 2—Proof that such custom and office routine was followed

on the specific occasion involved, to the extent that it may be reasonably presumed the letter was actually mailed. *Ford v. Cunningham*, 87 Cal 209, 25 Pac 403; *Brailsford v. Williams*, 15 Md 150, 74 Am Dec 559; *Samuel Hardin Grain Co. v. Missouri P. R. Co.* 120 Mo App 203, 96 SW 681; *Gardam v. Batterson*, 198 NY 175, 91 NE 371.

These requirements are illustrated in the holding that it is insufficient to show that letters to be mailed are placed in a tray, and periodically taken out by a clerk whose duty it is to mail them, according to a well-established office routine. *Gardam v. Batterson*, 198 NY 175, 91 NE 371.

The court held here as follows: "It was essential in this case, to the admissibility of the copies, that the testimony of the defendant as to the sending of the letters should have been supplemented by the further evidence of the clerk, or other employee, whose duty it was to post letters, that in the regular course of business he had invariably collected the letters upon the defendant's desk and had posted them. However strong the convictions and the statements of the defendant as to the usual mailing of the letters placed on his desk, there was the gap in the proof created by the failure to show that regular practice or custom of carrying them to the post, by someone charged with that duty, from which a presumption would naturally arise of these letters having been posted." *Gardam v. Batterson*, 198 NY 175, 91 NE 371.

Similarly, it is held insufficient to merely establish that a witness gave a specific order to an employee to mail a letter, in the absence of proof as to the actual mailing. *Pier-son-Lathrop Grain Co. v. Barker*, 223 SW 941 (Mo App).

See also *Federal Asbestos Co. v. Zimmerman*, 171 Wis 594, 177 NW 881, holding:

"We know of no decided case which holds that mere dictation or writing of a letter, coupled with evidence of an office custom with reference to the mailing of letters, is sufficient to constitute proof of the mailing of such letter, in the absence of some proof or corroborating circumstance that the letter, was, at least, placed where, in the ordinary course of business, it would be taken to the post office."

"In order to show a mailing it was necessary for plaintiff to produce the person who mailed the letters. The law does not require impossibilities and we can imagine, where a business firm is doing a large amount of correspondence, the per-

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son mailing the letters of the concern might not remember the mailing of a particular letter, and under such circumstances it ought not to be necessary to require any distinct recollection; but if a person actually doing the mailing should testify that it was his general and invariable practice to deposit in the mail all letters of the firm received by him, and this is connected up by a showing of an invariable custom of the writer or writers of letters to deliver them to such person for mailing, such testimony ought to be sufficient." *Pierson-Lathrop Grain Co. v. Barker*, 223 SW 941 (Mo App).

It is clear, however, from an examination of the decisions upon this point that the facts and circumstances in each case will alone decide the probative value of a specific custom and its adherence in a specific case. There are some decisions which require a relatively higher degree of proof in this connection than others. See cases collected in 25 ALR 18.

Thus, in one instance it was held insufficient to show that a letter was deposited in a box used only for outgoing mail in a mercantile establishment, and that an employee recalled mailing all the letters in such box, but without any specific recollection as to the letter at issue. *Rawleigh Medical Co. v. Burney*, 25 Ga App 20, 102 SE 358.

"In this case the evidence wholly failed to establish affirmatively the essential fact that the letter alleged to have been written and mailed by the defendant to the plaintiff was deposited in any post office or United States postal mail collector. On the contrary, the evidence showed that the letter, after having been written, properly stamped, and addressed, was merely placed in a cigar box in a grocery store, which box was used as a place to hold letters which were to be subsequently carried by some agent or employee of the grocery company to the post office, and there mailed. While there was some evidence that, subsequently to the placing of the letter in question in the cigar box, the letters therein (several letters being in the box on that occasion) were carried by an employee of the grocery company to the post office, and there mailed, there was no direct or positive evidence that this particular letter was so carried and mailed. The employee who on that occasion carried the mail from the grocery store to the post office testified that he could not say how many letters he carried to the post office that night, or what letters they were, and that he did not recollect seeing this particular let-

ter when he carried the mail. It was possible, under the facts shown, that the letter in question was either misplaced in the grocery store before the mail was carried to the post office, or that it was lost while in transit thereto." *Rawleigh Medical Co. v. Burney*, 25 Ga App 20, 102 SE 358.

Apparently at conflict with this decision is the holding expressed in the following: "The fact, too, of sending a letter to a post office will, in general, be regarded by a jury as presumptively proved, if it be shown to have been handed to, or left with, the clerk whose duty it was, in the ordinary course of business, to carry letters to the post office, and if he can declare that, although he has no recollection of the particular letter, he invariably took to the post office all letters that either were delivered to him, or were deposited in a certain place for that purpose." *Knickerbocker L. Ins. Co. v. Pendleton*, 115 US 339, 29 L ed 432.

Supporting this view is the holding that where a witness wrote a letter and placed it on a mailing table to be taken out for posting by an employee, and that such custom was regularly followed as an office routine, sufficient proof of mailing is established. *Ft. Smith v. F. W. Heitman*, 44 Tex Civ App 358, 98 SW 1074.

"We think these facts afforded a presumption that the letter was mailed, and properly mailed—that is, with the necessary postage affixed. With regard to the correspondence of an ordinary business concern, . . . it would be possible in any case, after the lapse of much less time than in the present case, to prove by direct evidence that a letter shown to have been written was deposited in the post office properly addressed and stamped. It is true that a letter will not be presumed to have been received unless this is shown; but we think this fact of proper mailing may be shown by circumstances, and that the regular and settled custom of a business house with regard to the disposition of letters sent out by it through the mail would be admissible as such a circumstance, and sufficient to uphold an inference by the jury that such letter was regularly mailed,—that is, deposited in the post office, properly addressed and stamped,—and was received by the addressee." *Ft. Smith v. F. W. Heitman*, 44 Tex Civ App 358, 98 SW 1074.

The person who did the actual mailing, as distinguished

from those who followed the office custom preliminary to such mailing, should be called as a witness at the trial. *Brailsford v. Williams*, 15 Md 150, 74 Am Dec 559, where it was stated: "We think, however, that the evidence offered for the purpose of showing that the letter had been mailed was not legally sufficient. The fact was to be found by the jury from the custom prevailing in the countingroom of the writer; but compliance with the custom had not been fully proved. The person whose duty it was to deposit letters in the post office should have been called, or his absence accounted for."

**MONOPOLY OR COMBINATION IN RESTRAINT OF TRADE,
ACTION INVOLVING**

(Action for injunction to restrain violation of Sherman Act)

Q—You are the plaintiff in this action?

Q—In what business are you engaged? A—In the sale of drugs and sundries through retail stores.

Q—Where do you maintain your places of business?

Q—Do you market such articles as fountain pens and pencils?

Q—Have you, at any time in the past, sold the defendant's fountain pen and pencil?

Q—For how long a period of time did you sell the defendant's product?

Q—During that time, did you have occasion to advertise these products?

(Describe the extent to which plaintiff established himself as a well-known and successful retail merchant.)

Q—Are you able to state, of your own knowledge whether the defendant had occasion to advertise its products in local newspapers?

(Show that defendant has built up a large demand for its products.)

Q—Now describe the nature of the arrangement by which you sold the products of this defendant?

(Show where possible that defendant merchandises its products by selling them outright to dealers throughout the nation; thus parting with full title and ownership.)

Q—Upon what date did you receive your last shipment of goods from the defendant?

Q—Did you, on or about that date, receive a letter from the defendant regarding the conditions under which you could continue to sell its products?

Q—I show you a letter, dated October 9th, 1942 and ask if that is the letter to which you refer?

(Establish in detail the specific acts alleged to constitute an unlawful restraint of trade.)

It is well settled that a person who has been injured in his trade or business as a result of the activities of an unlawful monopoly or restraint of trade, may recover damages in an action at law for such losses as he has suffered. *Evenson v.*

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Spaulding, 150 Fed 517, 9 LRA(NS) 904; Carlson v. Carpenter, 305 Ill 331, 137 NE 222, 27 ALR 625; Klingel v. Sharp & Dohme, 104 Md 218, 64 Atl 1029, 7 LRA(NS) 976; Davis v. New England R. Pub. Co. 203 Mass 470, 89 NE 565, 25 LRA(NS) 1024; Ertz v. Produce Exchange Co. 82 Minn 173, 84 NW 743, 51 LRA 825; Cleland v. Anderson, 66 Neb 252, 75 Neb 273, 92 NW 306; Crouch v. Gray, 154 Tenn 521, 290 SW 391, 50 ALR 1023; Hawarden v. Youghioghenny, etc. Co. 111 Wis 545, 87 NW 472, 55 LRA 828. See also 36 Am Jur § 204, p 660.

Monopolies and contracts in restraint of trade are generally subject to state regulation under the police powers, subject, of course, to Acts of Congress governing interstate and foreign commerce. Accordingly, most jurisdictions provide for enforcement of rights accruing to persons injured as the result of an illegal scheme in restraint of trade or any unlawful combination. A wide variety of articles may be the subject of a monopoly or scheme in restraint of trade. The law has placed no limitation in this respect; thus, it has been held that such commodities as salt, milk, coke, ice, meat, grain, machines, glue, and alcohol may legally form the subject of a monopoly. (See 36 Am Jur § 101, p. 578.) Courts are not generally disposed to recognize any distinction between necessities and other articles, in passing upon what constitutes a monopoly or scheme restraining trade.

The Federal district court has jurisdiction of a proceeding for an injunction to restrain a violation of the Sherman Anti-Trust Act. No jurisdiction vests in the state court. A proceeding against a corporation may be instituted not only in the district of which it is an inhabitant, but also in the district wherein it may be found or transacts business.

The application may be made by a private party under the provisions of the Clayton Act of 1914 (15 USC § 26). A bond should be posted upon granting of the application, conditioned for payment of any damages incurred as a result of the injunction in the event the same is later vacated. Without such bond a restraining order may not issue.

Before framing his pleadings for relief under the Sherman Anti-Trust Act, counsel should note the following:

a. **Is the relief sought preventative in character?** The statute only authorizes applications to prevent violations. It does not allow suits to cancel executed transactions.

b. Are the acts complained of such as directly affect, or flow from, interstate commerce? Injunctive relief may not be sought to restrain acts that revolve around purely local commerce, as distinguished from interstate transactions.

c. Has the applicant sustained actual injury, or is the wrong one that falls equally upon the broad and general public? The suit is improperly maintained if based upon the latter premise. The moving papers should be explicit in showing the damages sustained by the petitioner. Mere characterizations are insufficient. Actual damages need not, however, be shown; it is sufficient to establish a dangerous probability of injury.

d. Are the acts complained of in present operation, or were they recently discontinued? An injunction will not issue to enjoin a practice which was abandoned prior to the institution of the suit, there being nothing to indicate the probability of its being resumed. It may be noted, however, that where a conspiracy is shown to have existed, an abandonment thereof must be shown by definite proof; no presumption of abandonment will be drawn.

The requirements of Rule 65 of the Federal Rules of Civil Procedure, respecting injunctions generally, should be consulted. Counsel should note that Rule 40 confers precedence in suits for injunctive relief of the character under discussion.

It is often difficult to draw a line of demarcation between acts that constitute unlawful combinations of trade, and those that are legally permissible, notwithstanding they operate to drive a competitor out of business. A common test applied in this connection is the intent of the actor; where the intent is to accomplish the destruction of a competitor's business, or is otherwise malicious, a combination or scheme of restraint may fall within the prohibited class. *National Fireproofing Co. v. Mason Builders Asso.* 169 Fed 259, 26 LRA (NS) 148; *Carlson v. Carpenter Contractor's Assn.* 305 Ill 331, 137 NE 222, 27 ALR 625; *Vegelahn v. Guntner*, 167 Mass 92, 44 NE 1077, 35 LRA 722; Annotation: 9 LRA(NS) 904.

Thus, it has been pointed out that one person by malicious motives may attract to himself the trade of another, and thereby ruin the business of the latter, without violating any rules of law respecting creation of schemes in restraint of trade, whereas the same end accomplished by a combination

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of actors may constitute an illegal combination, for which an action in damages may be maintained. *Hawarden v. Youghioghny, etc. Co.* 111 Wis 545, 87 NW 472, 55 LRA 828.

In those instances where irreparable injury is threatened as a result of the activities of an unlawful monopoly, injunctive relief should be applied for.

The evidence presented should be complete and detailed in its description of the circumstances constituting the illegal combination; mere speculations should be avoided. In this connection it may be noted that the acts of one member of the combination, performed in furtherance of the common design and aim of the group, is admissible in evidence against the entire group or any other member thereof, irrespective of proof that the acts were directly participated in by the other members of the conspiracy. *Cleland v. Anderson*, 66 Neb 252, 75 Neb 273, 92 NW 306.

Exemplary damages may be awarded for a wilful violation of the plaintiff's rights by an unlawful combination, particularly where such violation takes place under circumstances showing insult, malice or spite. See 36 Am Jur § 205, n 662.

The Federal statutes in point hold that a person who has been injured in his business as a result of an act forbidden by the anti-trust laws shall be entitled to recover threefold the damages he has sustained; it is of course essential that the evidence establish a specific loss or injury. *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 US 390, 51 L ed 241.

NUISANCE, INJUNCTION TO PREVENT

(Examination of complainant in action to restrain erection of a sewage disposal plant)

Q—Where do you reside?

Q—Are you the owner of this property?

Q—How long have you lived at this address?

Q—About how far is this location from the northwest corner of Franklin and Westley Avenues?

(Fix the precise location of the alleged nuisance; where necessary, an authenticated map or survey should be prepared for use at the trial.)

Q—You are generally familiar with this locality?

Q—How often do you have occasion to pass that vicinity?

Q—I show you a photograph, and ask if you recognize the scene shown therein? A—Yes, it is the corner of Franklin and Westley Avenues.

(Offered in evidence as plaintiff's exhibit 1.)

Q—I now show you three additional photographs, and ask if you recognize the scenes therein shown?

(The photographs should show the character of the immediate vicinity of the alleged nuisance, thereby indicating the density of private dwellings, stores, traffic, schools, etc.)

Q—What does this photograph, marked plaintiff's exhibit 2, show? A—It shows Monroe Public School on Franklin Street.

Q—How far is this school from the corner of Franklin and Westley Avenues?

Q—What does this photograph, marked plaintiff's exhibit 3, show? A—It shows the Abbott Apartment Building on Hill Street.

Q—How far is this location from the corner of Franklin and Westley Avenues?

(The proof should cover in detail the proximity of dwellings or public buildings likely to be affected by the proposed construction.)

Counsel should show in detail at the trial such pertinent factors as:

1. Manner of construction of sewage plant, as shown in plans filed with local authorities.

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2. The strong probability that such construction will not prevent noxious odors, etc.

3. The availability of other sites for construction of the proposed sewage plant, more distant from populated areas.

4. The precise respects in which the proposed operation would adversely affect the public health or convenience.

Expert testimony may be helpful, if not necessary, in some cases to prove certain alleged consequences of construction of the sewage plant in the manner proposed.

Expert testimony is obviously essential where the question of nuisance depends upon the manner in which the proposed plant will be operated.

It is not necessary where the issues depend upon observable facts, understandable to all.

An equitable action to enjoin a potential or anticipated nuisance should not be instituted unless the proof available in support of the plaintiff's case is such as to clearly establish that a nuisance will result from the acts sought to be enjoined. *State v. Mobile*, 5 Port (Ala) 279, 30 Am Dec 564; *Rosser v. Randolph*, 7 Port (Ala) 238, 31 Am Dec 712; *Walker v. Allen*, 72 Ala 456; *Cowell v. Martin*, 43 Cal 605; *Weis v. Superior Ct.* 30 Cal App 730, 159 Pac 464; *Seigle v. Bromley*, 22 Colo App 189, 124 Pac 191; *Carr v. Washington & O. D. R. Co.* 44 App DC 533, Ann Cas 1918D, 818; *Gray v. Baynard*, 5 Del Ch 499; *Lutterloh v. Cedar Keys*, 15 Fla 306; *Coker v. Birge*, 9 Ga 425, 54 Am Dec 347; *Norwood v. Dickey*, 18 Ga 528; *Cunningham v. Rome R. Co.* 27 Ga 499; *Columbus v. Jaques*, 30 Ga 506; *DeGive v. Seltzer*, 64 Ga 423; *Whitaker v. Hudson*, 65 Ga 43; *De Vaughn v. Minor*, 77 Ga 809, 1 SE 433; *Quitman v. Underwood*, 148 Ga 152, 96 SE 178; *Sutton v. Findlay Cemetery Asso.* 270 Ill 11, LRA1916B, 1135, 110 NE 315, Ann Cas 1917B, 559; *Flood v. Consumers Co.* 105 Ill App 559; *St. John v. North Utica*, 157 Ill App 504; *Rohrbach v. Cavallini*, 210 Ill App 182; *Stotler v. Rochelle*, 83 Kan 86, 29 LRA(NS) 49, 109 Pac 788; *Louisville & T. Turnp. Road Co. v. Anderson*, 110 Ky 138, 61 SW 13; *Com. ex rel. Pratt v. McGovern*, 116 Ky 212, 66 LRA 280, 75 SW 261; *Gibson v. Black*, 10 Ky L Rep 373, 9 SW 379; *Miley v. A'Hearn*, 13 Ky L Rep 834, 18 SW 529; *Alexander v. Tebeau*, 24 Ky L Rep 1305, 71 SW 427;

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Fuselier v. Spalding, 2 La Ann 773; Varney v. Pope, 60 Me 192; Tracy v. LeBlanc, 89 Me 304, 36 Atl 399; Sterling v. Littlefield, 97 Me 479, 54 Atl 1108; Whitmore v. Brown, 102 Me 47, 9 LRA(NS) 868, 120 Am St Rep 454, 65 Atl 516; Houlton v. Titcomb, 102 Me 272, 10 LRA(NS) 580, 120 Am St Rep 492, 66 Atl 733; Lamborn v. Covington Co. 2 Md Ch 409; Roman v. Strauss, 10 Md 89; Hamilton v. Whitridge, 11 Md 128, 69 Am Dec 184; Dittman v. Repp, 50 Md 516, 33 Am Rep 325; Baltimore v. Fairfield Improv. Co. 87 Md 352, 40 LRA 494, 67 Am St Rep 344, 39 Atl 1081; Davis v. Baltimore & O. R. Co. 102 Md 371, 62 Atl 572; Cadigan v. Brown, 120 Mass 493; Atty. Gen. v. Jamaica Pond Aqueduct Corp. 133 Mass 361; Wright v. Lyons, 224 Mass 167, 112 NE 876; St. Johns v. McFarlan, 33 Mich 72, 20 Am Rep 671; Stone v. Roscommon Lumber Co. 59 Mich 24, 26 NW 216; Whittemore v. Baxter Laundry Co. 181 Mich 564, 52 LRA(NS) 930, 148 NW 437, Ann Cas 1916C, 818; Barth v. Christian Psychopathic Hospital Asso. 196 Mich 642, 163 NW 62; Saier v. Joy, 198 Mich 295, LRA1918A, 825, 164 NW 507; Wilder v. DeCou, 26 Minn 10, 1 NW 48; Nelson v. Swedish E. Lutheran Cemetery Asso. 111 Minn 149, 34 LRA(NS) 565, 126 NW 723, 127 NW 626, 20 Ann Cas 790; Trauernicht v. Richter, 141 Minn 496, 169 NW 701; Whitfield v. Rogers, 26 Miss 84, 59 Am Dec 244; Welton v. Martin, 7 Mo 307; Glaessner v. Anheuser-Busch Brewing Asso. 100 Mo 508, 13 SW 707; State ex rel. Chicago, B. & Q. R. Co. v. Woolfolk, 269 Mo 389, 190 SW 877; Lowe v. Prospect Hill Cemetery Asso. 58 Neb 94, 46 LRA 237, 78 NW 488; Bangs v. Dworak, 75 Neb 714, 5 LRA(NS) 493, 106 NW 780, 13 Ann Cas 202; Letherman v. Hauser, 77 Neb 731, 110 NW 745; Coe v. Winnepisiogee Lake Cotton & Woolen Mfg. Co. 37 NH 254; Burnham v. Kempton, 44 NH 78; Manchester v. Smyth, 64 NH 380, 10 Atl 700; Society for Establishing Useful Manufactures v. Morris Canal & Bkg. Co. 1 NJ Eq 157, 21 Am Dec 41; Vanwinkle v. Curtis, 3 NJ Eq 422; Robeson v. Pittenger, 2 NJ Eq 57, 32 Am Dec 412; Shields v. Arndt, 4 NJ Eq 234; Gardner v. Newburgh, 2 Johns Ch 162, 7 Am Dec 526; Watertown v. Cowen, 4 Paige (NY) 510, 27 Am Dec 80; Atty. Gen. v. Cohoes Co. 6 Paige (NY) 133, 29 Am Dec 755; Mohawk Bridge Co. v. Utica & S. R. Co. 6 Paige (NY) 554; Hudson v. Thorne, 7 Paige (NY) 261; Rochester v. Curtiss, Clarke Ch 336; Catlin v. Valentine, 9 Paige (NY) 575; Davis v. New York, 14 NY 506, 67 Am Dec

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186; *People v. Vanderbilt*, 26 NY 287; *Claire v. Matzke*, 86 Wis 291, 39 Am St Rep 900, 56 NW 874; *Marshfield v. Wisconsin Teleph. Co.* 102 Wis 604, 44 LRA 565, 78 NW 735; *Pfieger v. Groth*, 103 Wis 104, 79 NW 19; *Rogers v. John Week Lumber Co.* 117 Wis 5, 93 NW 821. See also 7 ALR 749.

Where the right of the complainant is doubtful, or the acts or things he seeks to enjoin are not nuisances per se, and will not necessarily become a nuisance, but may or may not become such, depending upon the use, manner of operation, or other circumstances, equity will not ordinarily interfere. *Swain v. Morris*, 93 Ark 362, 125 SW 432, 20 Ann Cas 930; *Cooper v. Whissen*, 95 Ark 545, 130 SW 703; *Middleton v. Franklin*, 3 Cal 238; *Hoke v. Perdue*, 62 Cal 545; *Thebaut v. Canova*, 11 Fla 143; *Garnett v. Jacksonville, St. A. & H. R. R. Co.* 20 Fla 889; *Mygatt v. Goetchins*, 20 Ga 350; *Harrison v. Brooks*, 20 Ga 537; *Cunningham v. Rice*, 28 Ga 30; *Rounsaville v. Kohlheim*, 68 Ga 668, 45 Am Rep 505; *Dunning v. Aurora*, 40 Ill 481; *Lake View v. Letz*, 44 Ill 81; *Thornton v. Roll*, 118 Ill 350, 8 NE 145; *Chicago General R. Co. v. Chicago, B. & Q. R. Co.* 181 Ill 605, 54 NE 1026; *Iliff v. School Directors*, 45 Ill App 419; *Begein v. Anderson*, 28 Ind 79; *Keiser v. Lovett*, 85 Ind 240, 44 Am Rep 10; *Bowen v. Mauzy*, 117 Ind 258, 19 NE 526; *Dalton v. Cleveland, C. C. & St. L. R. Co.* 144 Ind 121, 43 NE 130; *Shiras v. Olinger*, 50 Iowa, 571, 32 Am Rep 138; *Reynolds v. Union Sav. Bank*, 155 Iowa 519, 49 LRA(NS) 194, 136 NW 529; *Hutchinson v. Delano*, 46 Kan 345, 26 Pac 740; *Hahn v. Thornberry*, 7 Bush (Ky) 403; *Pfingst v. Senn*, 94 Ky 556, 21 LRA 569, 23 SW 358; *District Attorney v. Lynn & B. R. Co.* 16 Gray (Mass) 243; *Atty. Gen. v. Metropolitan R. Co.* 125 Mass 515, 28 Am Rep 264; *Siegel v. Wayne Circuit Judge*, 155 Mich 459, 119 NW 645; *Gwin v. Melmoth*, *Freem Ch* 505; *McCutchen v. Blanton*, 59 Miss 116; *Welton v. Martin*, 7 Mo 307; *Julia Bldg. Asso. v. Bell Teleph. Co.* 88 Mo 258, 57 Am Rep 398; *Van De Vere v. Kansas City*, 107 Mo 83, 28 Am St Rep 396, 17 SW 695; *McDonough v. Robbens*, 60 Mo App 156; *Holke v. Herman*, 87 Mo App 125; *Lowe v. Prospect Hill Cemetery Asso.* 58 Neb 94, 46 LRA 737, 78 NW 488; *Braasch v. Cemetery Asso.* 69 Neb 300, 95 NW 646, 5 Ann Cas 132; *Burnham v. Kempton*, 44 NH 78; *Manchester v. Smith*, 64 NH 380, 10 Atl 700; *Rogers v. Dan-*

forth, 9 NJ Eq 289; *Butler v. Rogers*, 9 NJ Eq 487; *Thompson ex rel. Bergen v. Paterson*, 9 NJ Eq 624; *Wolcott v. Melick*, 11 NJ Eq 204, 66 Am Dec 790; *Rochester v. Curtiss*, Clarke Ch 336; *Mohawk Bridge Co. v. Utica & S. R. Co.* 6 Paige (NY) 554; *O'Reilly v. Perkins*, 22 RI 364, 48 Atl 6; *Kirkman v. Handy*, 11 Humph (Tenn) 406, 54 Am Dec 45; *Lytton v. Steward*, 2 Tenn Ch 586; *Elliott v. Ferguson*, 37 Tex Civ App 40, 83 SW 56; *Robinson v. Dale*, 62 Tex Civ App 277, 131 SW 308; *Moore v. Coleman*, — Tex Civ App —, 195 SW 212; *Strieber v. Ward*, — Tex Civ App —, 196 SW 720; *Curtis v. Winslow*, 38 Vt 690; *Talley v. Tyree*, 2 Rob (Va) 500; *Winsor v. Hanson*, 40 Wash 423, 82 Pac 710; *Rea v. Tacoma Mausoleum Asso.* 103 Wash 429, 1 ALR 541, 174 Pac 961; *Chambers v. Cramer*, 49 W Va 395, 54 LRA 545, 38 SE 691; *Pope Bros. v. Bridgewater Gas Co.* 52 W Va 252, 43 SE 87; *Sheboygan v. Sheboygan & F. du L. R. Co.* 21 Wis 667; *State v. Eau Claire*, 40 Wis 533; *Janesville v. Carpenter*, 77 Wis 288, 8 LRA 803, 20 Am St Rep 123, 46 NW 128; *Priewe v. Fitzsimons & C. Co.* 117 Wis 497, 94 NW 317.

The fact that a proposed structure will increase the risk to the complainant from fire, and consequently raise his insurance rates, will not warrant a granting of an injunction. *Chambers v. Cramer*, 49 W Va 395, 54 LRA 545, 38 SE 691. See also 7 ALR 749.

It should be carefully noted that in most jurisdictions the mere depreciation in value of adjoining property is insufficient, standing alone, to warrant issuance of an injunction. *Siskiyou Lumber & Mercantile Co. v. Rostel*, 121 Cal 511, 53 Pac 1118; *Van De Vere v. Kansas City*, 107 Mo 83, 28 Am St Rep 396, 17 SW 695; *Morris & E. R. Co. v. Prudden*, 20 NJ Eq 530; *Duncan v. Hayes*, 22 NJ Eq 25; *Northfield v. Atlantic County*, 85 NJ Eq 47, 95 Atl 745; *Rhodes v. Dunbar*, 57 Pa 274, 98 Am Dec 221; *Dunn v. Austin*, 77 Tex 139, 11 SW 1125; *Elliott v. Ferguson*, 37 Tex Civ App 40, 83 SW 56; *Curtis v. Winslow*, 38 Vt 690; *Rea v. Tacoma Mausoleum Asso.* 103 Wash 429, 1 ALR 541, 174 Pac 961.

The fact that a planing and sawmill on a lot adjacent to a boardinghouse will injure the prestige of the house, making it less desirable for the better class of boarders, and thus lessen profits, is not a ground for restraining its erection and operation. *Duncan v. Hayes*, 22 NJ Eq 25. See also 7 ALR 749.

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The evidence assembled in support of the allegations should follow a definite pattern or continuity, directed to proof of a specific and clearly defined danger or nuisance. A common failing of counsel in actions of this character is in omitting to focus the available proof upon a single objective. Thus, evidence of acts which constitute an inconvenience to others, or which, if viewed in relation to other factors not brought out, would make out a nuisance, is insufficient to establish the right to injunctive relief.

It is clear that no hard and fast rule can be propounded as to which acts approximate a nuisance in the eyes of the law, and those that fall short of this classification. A reasonably accurate test is found in the following definition:

"The real question in all such cases, as stated by the authorities, is whether the nuisance complained of will or does produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits, and as, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the party. A prospective or threatening nuisance is subject to the same test, and against which a party would have a clear right to preventive relief in equity." *Hamilton v. Julian*, 130 Md 597, 101 Atl 558, 7 ALR 746.

Elsewhere it is stated that the complainant must establish the prospective nuisance with clearness and reasonable certainty; the danger apprehended must appear to be imminent, and, in the natural course of events, clearly impending, and the injuries in their nature and character irreparable. *Rochester v. Erickson*, 46 Barb (NY) 92.

Some of the criteria to be considered by counsel are:

1—Length of time the condition existed. What circumstances can be shown in support of this factor? To what extent has the condition or danger changed during this period of time? Has it grown worse, remained the same, or become less of a nuisance?

2—What agencies or persons created the condition complained of? To what extent was a choice offered such persons or agencies, between erecting a potential or actual nuisance or danger, and creating a condition that offers no such hazards or objections? Who owns the nuisance, and who

maintains the same? Is the operation pursuant to the consent, direction or knowledge of the owners?

3—How certain is the available proof in support of the proposition that injury or damage will result from the operation of the alleged nuisance? Unless the complainant is able to make out a case of strong probability, or as frequently stated, show the potential danger with a reasonable degree of certainty, the action should be withheld until additional proof can be secured. Upon the other hand, absolute certainty of damage or injury is not required. See 7 ALR 749.

Absolute certainty of injury unless an injunction is issued to restrain a threatened nuisance need not be shown to warrant the granting of the injunction: there must be a reasonable probability. *Nelson v. Swedish E. Lutheran Cemetery Asso.* 111 Minn 149, 34 LRA(NS) 565, 126 NW 723, 127 NW 626, 20 Ann Cas 790 (suit to enjoin establishment of cemetery); *Miley v. A'Hearn*, 13 Ky L Rep 834, 18 SW 529.

While perhaps proof that the nuisance is inevitable, or will necessarily ensue, may be properly demanded when nothing more than discomfort is anticipated, a reasonable certainty that the nuisance will result unless the injunction is granted is sufficient when danger to health or life is threatened. *Holke v. Herman*, 87 Mo App 125 (where an injunction was sought to restrain the establishment of a pond near the complainant's residence).

4—To what extent does the nuisance or condition complained of serve the public convenience generally? Courts are less disposed to interfere where the apprehended mischief is from agencies that have a tendency to promote the public convenience and welfare generally. *Harrison v. Brooks*, 20 Ga 537.

5—Balancing the equities in the case, which will result in the greater loss or damage among the respective parties, suppression of the agency involved, or its continuance under existing conditions?

The court may balance the inconvenience likely to be incurred by the respective parties, in case of a threatened nuisance, and grant or withhold the injunction according to a sound discretion; and the injunction will not ordinarily issue when the benefit to one party is but small, while it would oper-

ate oppressively and to the annoyance and injury of the other party, unless the wrong is so wanton and unprovoked as to deprive the defendant of equitable consideration.

This rule is especially true where the alleged threatened nuisance, while highly beneficial to one party, may possibly not be prejudicial to the other. *Hough v. Doylestown*, 4 Brewst (Pa) 333 (refusing to enjoin diversion of water by a municipality for domestic uses, at the instance of a mill owner).

6—Does the complaint show facts, as distinguished from mere opinions or conclusions? Unless the pleadings conform to this requirement, the action cannot be maintained. *Kingsbury v. Flowers*, 65 Ala 479, 39 Am Rep 14; *Branch Turnp. Co. v. Yuba County*, 13 Cal 190; *Payne v. McKinley*, 54 Cal 532; *Thebaut v. Canova*, 11 Fla 143; *Garnett v. Jacksonville, St. A. & H. R. Co.* 20 Fla 889; *Coast Line R. Co. v. Cohen*, 50 Ga 451; *Burrus v. Columbus*, 105 Ga 42, 31 SE 124; *Flood v. Consumers Co.* 105 Ill App 559; *Bowen v. Mauzy*, 117 Ind 258, 19 NE 526; *Roman v. Strauss*, 10 Md 89; *Adams v. Michael*, 38 Md 123, 17 Am Rep 516; *Davis v. Baltimore & O. R. Co.* 102 Md 371, 62 Atl 572; *Holke v. Herman*, 87 Mo App 125; *Clinton Cemetery Asso. v. McAttee*, 27 Okla 160, 31 LRA(NS) 945, 111 Pac 392; *Dunn v. Austin*, 77 Tex 139, 11 SW 1125; *Elliott v. Ferguson*, 37 Tex Civ App 40, 83 SW 56.

7—What is the nature of the damages about to be, or actually, suffered by the complainant?

In some jurisdictions, courts have applied the general rule with respect to equitable interference in cases involving nuisances, that the complainant must show an injury that is irreparable, or one which cannot be adequately compensated by damages in an action at law, and that he must establish a case of serious mischief, and not mere trifling discomfort. *Randall v. Freed*, 154 Cal 299, 97 Pac 669; *Bigelow v. Hartford Bridge Co.* 14 Conn 565, 36 Am Dec 502 (suit to enjoin rebuilding of causeway, on the ground of injury by overflow of the plaintiff's land); *Gray v. Baynard*, 5 Del Ch 499 (encroachment on highway); *Welton v. Martin*, 7 Mo 307 (alleged interference with the plaintiff's mill and dam by the proposed erection of another dam); *Quackenbush v. Van Riper*, 3 NJ Eq 350, 29 Am Dec 716 (refusing to enjoin erec-

tion of a dam which it was claimed would injure the complainant because of overflow); *Vanwinkle v. Curtis*, 3 NJ Eq 422 (refusing to enjoin diversion of part of the water of a stream which flowed through a corner of complainant's land and was not used by him).

The fact that the nuisance has been entirely inactive in its effects at the time of the institution of the action will not necessarily affect the right to injunctive relief, provided sufficient facts are adduced to show the character of the potential danger.

Eckles v. Weilbey, 232 Pa 547, 81 Atl 645, 7 ALR 739, holding that an injunction may be granted against the threatened establishment of a barn and yard for conducting a horse and cattle business in a residence section of a borough which will be a nuisance to neighboring property, although nothing has yet been done which would support an action at law or which has injured the complainant.

It may also be noted that equity possesses an inherent right to issue injunctive relief in cases of the character under discussion, notwithstanding the acts sought to be enjoined are also criminal in character. *State ex rel Chicago, B. & Q. R. Co. v. Woolfolk*, 269 Mo 389, 190 SW 877 (injunction sought against the illegal transportation of intoxicating liquor).

OPERATION, UNAUTHORIZED, ACTION FOR ASSAULT

(See Surgeon, Unauthorized Operation, Action for Assault)

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PARTNERSHIP, ESTOPPEL AS CREATING LIABILITY

Q—You are the plaintiff in this action?

Q—Did you, during the month of May 1943, have any conversation with John Bailey, one of the defendants in this action? A—I did.

Q—Please state the substance of this conversation. A—He requested the price on 400 gallons of oil, and I told him the price and full details as to grade, etc.

(In actions against a partnership on the theory of estoppel, it is well to make the individual contracting partner a separate party defendant.)

Q—Do you recall the exact date of these conversations?

Q—Where were the conversations held?

Q—Was there any paper or document signed at that time?
(Offer all signed agreements in evidence.)

Q—Do you know if this quantity of oil was shipped?

Q—Did you thereafter have any conversations with any member of the partnership relative to this shipment?

Q—State the date of these conversations and with whom held.

Q—Do you know who receipted for the shipment of the oil?

Q—Did you thereafter collect for this shipment?

(If part payment was made, by whom, and under what circumstances?)

(The proof should disclose in full the acts of the partnership claimed to constitute ratification of the acts of the partner.)

The law recognizes a partnership by estoppel, created where one or more persons follow a course of conduct calculated to lead another to the belief that a partnership in fact exists, whereas no such relationship did in fact exist at that time. See 40 Am Jur § 147, p 234.

It is also possible for a member of a partnership to act in a manner not authorized by the other partners, or their partnership agreement, and bind the other partners by his acts where they knew thereof and failed to do anything to indicate their disapproval, to the consequent damage of a third party relying upon such acquiescence. *Bonneau v. Strauss*, 72 Okla 110, 179 P 10, 4 ALR 255.

It has been held that a partner asserting title to partner-

ship real property as being in his copartner, is thereafter estopped from denying the validity of the conveyance. *Cross v. Weare Commission Co.* 153 Ill 499, 38 NE 1038, 46 Am St Rep 902.

It is, of course, essential to show that representations by a partner were in fact relied upon third persons in order to invoke the doctrine of estoppel; the mere fact of representations, standing alone, without the additional factor of reliance thereupon and consequent damage, is not sufficient to impose liability pursuant to this doctrine. *National Union Bank v. National Mechanics Bank*, 80 Md 371, 30 Atl 913.

A partner that exceeds his authority in purchasing property on the credit of the partnership, may bind the firm where the other partners accept the property purchased; the theory being in such cases that by accepting the property the firm has ratified the unauthorized acts of the partner incurring the purchase. *Porter v. Curry*, 50 Ill 319, 99 Am Dec 520.

It should be further noted in this connection that the partner who actually transacts business with a third person is himself individually liable. This liability exists separate and apart from that of the partnership. Thus, a partner who signs the firm name to a promissory note, when he has no authority to so act, is personally liable thereon. See 4 ALR 261.

The rule has also been stated that where a partner undertakes to enter a confession of judgment against the partnership, contrary to his authority as a partner, he is personally liable under the judgment. *North v. Mudge*, 13 Iowa 496, 81 Am Dec 441.

**PARTNERSHIP, PROVING ASSUMPTION OF LIABILITIES
BY NEW PARTNER**

There are several tests or criteria by which courts have gauged the question whether an incoming partner to a partnership has agreed to assume the debts of the old firm, or whether he is otherwise liable for such debts.

According to some courts, a partner may only become liable for debts existing prior to his entry into the firm by an express agreement to that effect. But the weight of authority allows such liability to be predicated upon surrounding circumstances which satisfactorily establish an implied agreement. See 45 ALR 1286, 1288; also 40 Am Jur § 219, p 282, et seq.

Where the new partner made a substantial contribution to the capital of the firm, sufficient to pay for his share in the partnership, this circumstance would obviously tend to show the lack of any implied agreement on his part to pay for the old debts of the firm.

Similarly, where the debts of the firm are large, and out of proportion to the investment made by the new partner, the courts will require strong and compelling circumstances to make out an implied agreement to pay debts. Ibid.

The following circumstances should be evaluated in considering the question whether an incoming partner has made himself liable for existing debts of a partnership:

1—To what extent, if any, did the incoming partner participate in the benefits of previous transactions of the partnership? This fact, standing alone, may not be sufficient to impose liability, but coupled with other facts, it may constitute persuasive evidence of the partner's intent. *Jones v. Davies*, 60 Kan 309, 56 P 484, 72 Am St Rep 354.

2—What entries exist in the books of the partnership indicative of the partner's intent to enter the debts of the old firm on the books of the new partnership? Thus, the fact that after creation of the new firm the books of the old were still used, with no change or line of demarcation between liability of the respective partners, may serve to indicate that the parties intended no change in the former allocation of debts and profits between the partners. See 40 Am Jur § 227, p 287.

3—What agreements exist between the parties, or what

understandings or admissions can be shown, that would indicate intent to have the new partner assume existing debts of the firm? The surrounding circumstances should be examined in detail to ascertain the intent of the parties in this connection. *Bracken v. Dillon*, 64 Ga 243, 37 Am Rep 70.

4—Did the new partner take an active part in fulfilling existing contracts? In what respects did he assume liability for compliance with the terms of an existing contract? This fact may prove helpful in connection with other circumstances in proving intent. *Fried v. Fisher*, 328 Pa 497, 196 A 39, 115 ALR 147.

5—Was the existing business carried on, as regards third persons and the outside world generally, as a full partnership without any interruption in the composition of the firm? Was any notice sent to creditors? See 40 Am Jur § 225, p 286.

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PARTNERSHIP, DISSOLUTION ON GROUND OF FRAUDULENT REPRESENTATION

- Q—You are the plaintiff in this action?
- Q—You are now a member of the firm of Day and Day?
- Q—When did you become a member of this firm?
- Q—Please tell this court and jury the nature of the business of this firm?
- Q—Now tell us what conversations, if any, you had with either of the other partners, prior to your entry into the firm, regarding the business of this partnership.
- Q—With whom were these conversations held?
- Q—And on what dates?
- Q—During the course of these conversations, what mention, if any, was made as to the type of merchandise sold by the firm? A—I was told by Mr. Day that the firm sold the following articles, etc.
(Show all representations in detail, whether oral or in writing.)
- Q—When did you assume an active part in the management of this business?
- Q—What sums of money, if any, did you invest in the partnership?
- Q—When were these sums placed with the partnership?
- Q—What did you later discover as to the nature of the business of Day and Day, the defendants? A—I discovered they were engaged in the sale of smuggled merchandise, etc.
- Q—Did you have any knowledge of this fact at the time you entered the business?
- Q—When was the first time you learned this circumstance?
- Q—Did you rely upon the representation of the defendants as to the nature of their business when you agreed to become a member of the firm?
- Q—What did you do upon learning the true nature of the defendant's business?
(Did the plaintiff by his acts subsequent to the discovery of the misrepresentations waive any rights to a dissolution of the partnership?)

A partnership may be subject to dissolution by a court of

equity where it is established that one of the partners was induced to enter into the relationship through fraud or false representation. *Fogg v. Johnson*, 27 Ala 432, 62 Am Dec 771; *Howell v. Harvey*, 5 Ark 270, 39 Am Dec 376; *Jones v. Weir*, 217 Pa 321, 66 Atl 550, 10 Ann Cas 692.

Mere dissension and difference between the partners, on matters pertaining to current business or business that took place before the formation of the new firm, will not ordinarily impel a court of equity to dissolve the firm. The charge of false representation must assume more than the character of a difference of opinion. As has been stated: "A court of equity has no jurisdiction to declare a separation between partners for trifling causes or temporary grievances involving no permanent mischiefs." *Gerard v. Gateau*, 84 Ill 121, 25 Am Dec 438.

Sickness of a partner, or his insanity or physical or mental incapacity, is not sufficient of itself to invoke equitable relief in the dissolution of the partnership relation. It is necessary to show that the incapacity alleged is of a character sufficient to warrant the assumption that the affected partner will be unable permanently to discharge his duties as a member of the firm, and that such disability is real and genuine, as distinguished from something conjectural. *Raymond v. Vaughn*, 128 Ill 256, 21 NE 566, 4 LRA 440.

Where the fraud is satisfactorily established, equity may compel the repayment to the new partner of whatever sums of money he placed in the firm, or grant such other relief as may serve to put the new partner in as close a position to his former status as is possible under the surrounding circumstances. *Jones v. Weir*, 217 Pa 321, 66 Atl 550.

The proof should make clear the following factors:

1—Nature of the representations, and their material character in the light of the surrounding circumstances. Unless the representation is of sufficient weight and materiality to lead to the reasonable belief it constituted an inducing factor, it will not ordinarily impel equity to dissolve the partnership relation. Thus, mere exaggerations or "puffing" by the partner as to the value of a specific asset, or the potential income of the firm, ordinarily is not material. *Gerard v. Gateau*, 84 Ill 121, 25 Am Rep 438.

2—The misrepresentations must have actually led the com-

plaining partner to act on the basis thereof. Unless the false statements acted as the inducing cause of the entry into the partnership, or served as one of the material factors in that connection, they will not justify dissolution. Thus, where it appears that false representations of a material character were made by the members of a partnership, but were misunderstood or overlooked by the new partner, insufficient ground for dissolution on the ground of fraud is set forth. See 40 Am Jur § 250, p 303.

3—The actual falsity of the statements offered by the complainant as having induced him to enter the partnership. It is not sufficient to show that the representations were proven false by events that took place after the new partnership was formed, but that they were in reality false and misleading at the time they were uttered. Ibid.

PARTNERSHIP, EVIDENCE OF EXISTENCE

Trials involving partnerships frequently raise questions pertaining to the characteristics of a partnership, or the criteria by which to determine whether a specific relationship approximated the legal status of a partnership.

Although no single test has been propounded by the courts to decide the question of a partnership, the following are helpful in evaluating the issue:

1—Did the parties share in the profits and losses, and if so, to what extent? While the fact that parties shared in the earnings of an enterprise is not of itself conclusive evidence of a partnership, it may constitute persuasive evidence thereof, particularly where coupled with one or more of the other indicia of a partnership relationship. *Westcott v. Gilman*, 170 Cal 562, 150 Pac 777; *Mulholland v. Patch*, 205 Mich 490, 171 NW 422, 18 ALR 468.

2—What writings exist indicative of the intention of the parties relative to the partnership relation? Examine leases, bills of sale, bank accounts, car ownerships, social security records, tax records, business contracts, correspondence between parties, company literature, etc.

3—Were there equal rights of management and representation, and if unequal to what extent were they unequal? Where parties have equal rights to the management of a business, and determination of its policies, the law will hold same strong evidence of a partnership relation. *Clark v. Emery*, 58 W Va 637, 52 SE 770.

4—What investments of capital were made in the business? What services were rendered by the parties, and what basis of compensation, or distribution of profits, was followed?

5—To what extent are the parties possessed of a property interest in the various chattels connected with the business? What acts of the parties manifest the extent of interest therein? Who purchased the various articles? It is clear that a party who possesses no property right in chattels, or property assets of a business, yet receives compensation for his services, is not ordinarily within the class of a partner. Conversely, some decisions hold that a party who shares in the property rights of a business that pays profits which are equally divided, is conclusively made a partner. See 137 ALR 58, 59.

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6—Did any of the parties to the business at any time hold themselves out to third persons as partners? To what extent does the business literature, trucks, labels, signs, etc., signify to third persons that a partnership in fact exists? Evidence of this type may prove helpful in showing the intention of the parties at the time they entered into their relationship. See 40 Am Jur § 43, p 156.

**PARTNERSHIP, WRONGFUL DISSOLUTION, ACTION
BY PARTNER**

The law is well settled that an action for damages may be maintained by a partner against his copartners, or another partner, for acts constituting a wrongful dissolution of the firm. *Kebart v. Aiken*, 232 Fed 454; *Newson v. Pitman*, 98 Ala 526, 12 So 412; *Wadsworth v. Manning*, 4 Md 59; *Dunham v. Gillis*, 8 Mass 462; *Terry v. Carter*, 25 Miss 168; *Hagenaers v. Herbst*, 30 App Div 546, 52 NY Supp 360; *McCollum v. Carlucci*, 206 Pa 312, 98 Am St Rep 780.

As has been stated: "A partner who assumes to dissolve the partnership, before the end of the term agreed on in the partnership articles, is liable, in an action at law against him by his copartner for the breach of the agreement, to respond in damages for the value of the profits which the plaintiff would otherwise have received." *Karrick v. Hannaman*, 168 US 328, 42 L ed 484.

The damages in cases of this character are the profits which would have accrued to the plaintiff from a continuation of the partnership business, and which are lost by the unauthorized dissolution. *Taylor v. Bradley*, 39 NY 129, 100 Am Dec 415; *Wakeman v. Wheeler, etc., Mfg. Co.* 101 NY 205, 4 NE 264.

"The question of the recovery of profits by a wronged partner may be divided into the recovery of actual profits or estimated prospective profits. Where the terms has expired before the suit or before the trial, and the business from which the plaintiff has been excluded, has made profits, these may afford a definite basis of his loss." Annotation: 51 LRA(NS) 84.

It is pointed out that the proper forum for an action of this character is a court of law where the recovery sought is for the loss of prospective profits; where the action is one for profits actually earned by continuance of the firm, the necessity for an accounting will render equity the proper tribunal. 4 ALR 159.

Thus, it has been held that a court of law is not the proper forum where it is essential for the jury to take a long accounting, embracing many transactions. *Price v. Middleton*, 75 SC 105, 55 SE 156.

Actions of the character under discussion are not within the Statute of Frauds, and may therefore be established by parol evidence where other proof is not available. *Farwell v. Wilcox*, 175 Pac 936 (Okla) 4 ALR 156.

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PARTITION, SUITS INVOLVING

Partition is defined as the division of property between several persons; such property may assume many forms, as real property in the character of lands or buildings, goods or hereditaments.

A voluntary partition is that entered into pursuant to an agreement between the parties, without a court order defining the terms or nature of the partition and compelling compliance with same. The law prescribes no specific mode for partition on a voluntary basis, provided of course, that it binds all the cotenants. See 40 Am Jur § 17, p 15.

Owelty is defined as the sum paid in the event of unequal division, in order to equalize the distribution. It is a specific sum of money to be paid pursuant to the terms of a court order by the person receiving the greater, to the one receiving the lesser, of the partition distribution. *Waller v. George*, 322 Mo 573, 16 SW(2d) 63.

The procedure to follow in actions for partition is governed largely by local statute. The action is normally one of equitable cognizance. *Field v. Leiter*, 16 Wyo 1, 90 Pac 378, 125 Am St Rep 997.

The rule generally prevails that only those persons who hold an interest in the property sought to be partitioned may become a proper party to the suit. *Shoup v. Cummins*, 334 Ill 539, 166 NE 118, 65 ALR 887.

Most statutes allow for service by publication where the party sought to be served cannot be found in the jurisdiction, or in the instance of an unknown or nonresident defendant. 40 Am Jur § 7, p 57.

Broad rules of pleading generally govern in the instance of actions for partition. Thus, it is stated that a complaint or petition in a partition action must set forth sufficient facts to evidence the ownership of the property involved, the interest of the parties named in the pleadings, the fact that all interested parties are named and made parties to the proceeding, as well as the necessary jurisdictional facts. *Roy v. Abraham*, 207 Ala 400, 92 So 792; *Barron v. Zimmerman*, 117 Md 296, 83 A 258; *Kromer v. Friday*, 10 Wash 621, 39 Pac 229.

The right to a trial by jury is provided by statute in most

jurisdictions upon issues of fact, or specifically named matters.

The judgment returned in a partition suit is conclusive upon the parties with respect to the matters adjudicated therein, assuming of course, that the court had proper jurisdiction over the parties and subject matter of the action. But not unlike judgments generally, a court of equity may grant relief in the instance of a judgment in partition where the issue of fraud, accident or mistake is raised. *Schwaman v. Truax*, 179 NY 35, 71 NE 464.

Thus, it has been held that where the complainant is prevented from bidding at a sale of the property involved, through a scheme of fraud or deception practiced by one of the defendants, equity will intervene to set aside the judgment recovered. *Ibid*.

Appointments of commissioners or referees to examine the property involved, the holding of hearings, rendering of report, sale of property, and confirmation of proceedings had, are generally regulated by local statute, which should always be consulted in cases of this character.

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PAYMENT OF DEBT, PRESUMPTION AFTER LAPSE OF TIME

Q—You are the plaintiff in this action?

Q—Did you, on or about the 8th day of April, 1923, loan certain funds to the defendant in this action?

Q—What amount did you loan the defendant?

Q—Did the defendant execute any written acknowledgment or evidence of this debt at that time? A—Yes.

Q—Describe the nature of this written evidence.

Q—I show you a written document, and ask if you can recognize this paper? A—Yes, it is the same paper signed by the defendant at that time.

Q—Do you recognize the signatures thereon?

(Offered in evidence.)

(See text for discussion of law relative to weight that may be accorded the fact that creditor still retains possession of written evidence of indebtedness.)

Q—Was this debt paid?

(Partial payments should be shown.)

Q—During the period of time elapsed since the execution of the paper marked in evidence did you have any conversations with the defendant respecting this debt? A—Yes.

Q—When were these conversations held, and where?

Q—Describe the substance of these conversations, as near as you can now recall. A—The defendant said he would pay the money out of a legacy that was due him, etc.

(See text for weight of admission by debtor in rebutting presumption of payment of debt.)

The law creates a strong presumption that after the lapse of a period of twenty years a debt is presumed paid. *Spencer v. Hurd*, 77 So 683 (Ala); *Courtney v. Staudenmeyer*, 56 Kan 392, 43 Pac 758, 54 Am St Rep 592; *Conkling v. Weatherwax*, 181 NY 258, 73 NE 1028; *Beekman v. Hamlin*, 19 Or 383, 24 Pac 195, 10 LRA 454; *Gregory v. Com.* 121 Pa 611, 15 Atl 452; *Reed v. Reed*, 46 Pa 239; *Foulk v. Brown*, 2 Watts (Pa) 209; *Dickson v. Gourdin*, 26 SC 391, 2 SE 303; *Updike v. Lane*, 78 Va 132; *Allison v. Wood*, 104 Va 765, 52 SE 559.

This basic rule of law has been applied to a wide variety of legal instruments, including bonds and coupons, *Dickson v.*

Gourdin, 26 SC 391, 2 SE 303; *Updike v. Lane*, 78 Va 132; *Allison v. Wood*, 104 Va 765, 52 SE 559; mortgages and deeds of trust, *Frye v. Hubbell*, 74 NH 358, 68 Atl 325; *Knapp v. Crane*, 14 App Div 120, 43 NY Supp 513; *Richards v. Walp*, 221 Pa 412, 70 Atl 815; judgments, *Beekman v. Hamlin*, 19 Or 383, 24 Pac 195, 10 LRA 454, and legacies and distributive shares, *Conklin v. Weatherwax*, 181 NY 258, 73 NE 1028.

As is well stated: "The rule that after the lapse of twenty years debts of every kind are presumed to be paid is a rule of convenience and policy, resulting from a necessary regard for the peace and security of society, and also for the debtor, who should not be called upon to defend stale claims, at a time when witnesses are dead, and papers lost or destroyed. This presumption does not bar the debt, however. Unlike the Statute of Limitations, it is merely a rule of evidence affecting the burden of proof, and no new promise is required as the basis of an action. Within twenty years the burden of proving payment is on the debtor; after that time it shifts to the creditor. To rebut the presumption, any competent evidence tending to show the debt is not, in fact, paid will be received. Although it need not be of the same quality as required to remove the bar of the Statute of Limitations it should, however, be clear and convincing." *Sheafer v. Woodside*, 257 Pa 276, 101 Atl 753.

Elsewhere it is stated: "Within the twenty years, the onus of proving payment lies on the defendant; after that time, it devolves on the plaintiff to show the contrary, by such facts and circumstances as will satisfy the minds of the jury that there were other reasons for the delay of the prosecution of the claim than the alleged payment. And if these facts are sufficient satisfactorily to account for the delay, then the presumption of payment, not being necessary to account for it, does not arise. Slighter circumstances are sufficient to repel the presumption than are required to take the case out of the Statute of Limitations, the latter being a positive enactment of the legislature; the former merely an inference on which legal belief is founded." *Foulk v. Brown*, 2 Watts (Pa) 209.

It is also stated that the "presumption of payment is based upon the experience of mankind that vouchers, acquittances and evidences of payment are not usually preserved from one generation to another; that creditors usually desire their own,

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without waiting a score of years upon their debtors; and that, where there has been no recognition of the claim by the debtor, and the creditor has forbore to assert a right for so long a time, it is most probable that his claim has been in some way satisfied." *Courtney v. Staudenmeyer*, 56 Kan 392, 43 Pac 758, 54 Am St Rep 592.

The strength of the presumption created varies with the jurisdiction and the facts of each case. Thus, in one instance it was held that a conclusive presumption of payment is created by the lapse of twenty years, where the creditor has been inactive during that period of time, and there has been no recognition of liability by the debtor. *Spencer v. Hurd*, 77 So 683 (Ala).

It should be further noted in this connection that the "presumption is rebutted, or, to speak more accurately, does not arise, where there is affirmative proof, beyond that furnished by the speciality itself, that the debt has not been paid, or where there are circumstances that sufficiently account for the delay of the creditor." *Reed v. Reed*, 46 Pa 239.

It is clearly a question dependent upon the facts and circumstances of each case whether the proof presented is sufficient to rebut the presumption of payment. *Frye v. Hubbell*, 74 NH 358, 68 Atl 325; *Knapp v. Crane*, 14 App Div 120, 43 NY Supp 513; *Richards v. Walp*, 221 Pa 412, 70 Atl 815; *Sheafer v. Woodside*, 257 Pa 276, 101 Atl 753.

A wide variety of proof is admissible to show that the debt is in fact unpaid. The proof may, for example, consist of an admission by the debtor himself that the debt is not paid, or consist of a course of conduct on the part of the debtor which is equivalent to such admission. *Ibid*.

The rule in this connection is expressed in the following: "Any competent evidence which tends to show that the debt is, in fact unpaid, is admissible for that purpose. The evidence may consist of the defendant's admission made to the creditor himself, or to his agent, or even to a stranger, but an admission will not be as readily implied from language casually addressed to a stranger, as when addressed to the creditor in reply to demand for a debt. It is of no consequence that the admission of nonpayment is accompanied by refusal to pay; the action is not founded on a new promise, but on the original indebtedness; the question, as against pre-

sumption, is whether or not the debt is, in fact, unpaid." Gregory v. Com. 121 Pa 611, 15 Atl 452.

The creditor may rebut the presumption of payment by proof that the debtor was unable to pay the debt, or lacked any means of otherwise securing payment thereof during the period relied upon to create the presumption. Annotation: 1 ALR 800.

In one instance it was pointed out: "The inference from insolvency will, indeed, be more or less forcible, according to its notoriety and duration. . . . Suppose it to prove that the debtor was discharged on his oath of insolvency before the debt fell due, and that ever since he had been a beggar in the street, or a pauper on the parish; the conclusion would be so morally and obviously certain that there could be no danger in telling the jury that there could not be a presumption of the payment in such a case. No one ought to be required to commit the folly of suing a beggar." Wood v. Deen, 23 NC 230.

In some cases it has been pointed out that the fact of the creditor's retention of possession of the written evidence of the indebtedness is sufficient to rebut the presumption of payment from lapse of time. Connecticut Mutl. L. Ins. Co. v. Dunscomb, 108 Tenn 724, 69 SE 345.

The lapse of a period of time less than twenty years will not, as a matter of law, create a presumption of payment of a debt. See cases collected in 1 ALR 791.

PAYMENT, PROVING WHERE NOT SPECIALLY PLEADED

The rule is generally stated that payment must be specially pleaded, and cannot be proven under a general denial. This rule is stated by decisions, either expressly or by implication, and in some jurisdictions statutes specially provide for this rule of pleading. *Kallock v. Hoagland*, 239 Fed 252; *Polak v. Winter*, 166 Ala 255, 51 So 998; *Snodgrass v. Snodgrass*, 81 Cal App 360, 253 Pac 755; *Harvey v. Denver & R. R. Co.* 44 Colo 258, 99 Pac 31; *Dickson v. Wainwright*, 137 Ga 299, 73 SE 515; *Baker v. Kistler*, 13 Ind 63; *American Oil Pump Co. v. Sizemore*, 210 Ky 690; *Monroe Grocer Co. v. Barron*, 16 La App 357, 134 So 735; *Marshall v. Child*, 76 Minn 173, 78 NW 1048; *Sivley v. Williamson*, 112 Miss 276, 72 So 1008; *Schackter v. Kukowsky*, 117 App Div 750, 102 NY Supp 1028; *Ellison v. Rix*, 85 NC 77; *Jones v. El Reno Mill & Elevator Co.* 26 Okla 796, 110 Pac 1071.

The theory behind this rule is stated to be that evidence of payment is new matter, which in effect constitutes a separate defense, and in fairness to the plaintiff, should be alleged in the answer. *Kimball v. Harker*, 35 ND 276, 152 NW 100.

At common law, the theory prevailed that the defendant could introduce evidence of payment under a plea of the general issue. This rule has been largely abrogated by statute and judicial decisions. *

At the same time, the plaintiff should be careful to observe that his pleading contains a statement of payment where this is a part of his cause of action. *Lent v. New York & M. R. Co.* 130 NY 504, 29 NE 988.

There exists a difference of opinion upon the question whether an allegation in the complaint of nonpayment is put in issue by a general denial in the answer. According to some decisions, such general denial does not put the question of nonpayment in issue, *Columbia Nat. Bank v. Western Iron & Steel Co.* 14 Wash 162, 44 Pac 145; but there is also authority for the view that a general denial under these circumstances places the question of nonpayment in issue. *Mutual Oil Co. v. Hamilton*, 73 Mont 385, 236 Pac 545.

Payment made after commencement of an action is generally held not properly shown as a defense or bar to the

action under a general denial, or a plea of the general issue. *Boyd v. Weeks*, 2 Denio (NY) 321, 43 Am Dec 749.

But it has also been held in this connection that payments made after institution of the action may properly be shown under a general denial for the purpose of reducing the damages or amount of the recovery that could otherwise be obtained. *Indiana, B. & W. R. Co. v. Adams*, 112 Ind 302, 14 NE 80.

Local statutes, and judicial interpretation thereof, will prove decisive of many of the points raised herein, as the common-law rule has been subjected to a wide variety of interpretations, according to the particular jurisdiction.

PERJURY, CIVIL ACTION FOR DAMAGES

It is well settled that a civil action will not lie for damages incurred through acts of perjury, committed during the giving of testimony in a civil or criminal proceeding. See cases collected in 12 ALR 1264, 81 ALR 1126.

Thus, it has been ruled that perjured testimony in a criminal proceeding resulting in the conviction of a defendant will not lay the basis for a civil action for damages. *Ibid*.

At the same time, however, it has been held that where the giving of false testimony is part of a general scheme or plan to defraud, an action for damages may be maintained. *Gusman v. Hearsey*, 28 La Ann 709, 26 Am Rep 104.

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PHOTOGRAPH, UNAUTHORIZED USE OF

- Q—You are the plaintiff in this action?
- Q—Did you, on or about the 9th day of June, 1944, visit the photographic studio of the defendant in this case?
- Q—Do you recall the exact date you made such visit?
- Q—And where is the studio of the defendant located?
- Q—What conversations did you have with the defendant respecting the taking of a photograph, if any? A—I ordered three photographs of myself, etc.
- Q—Were such photographs taken?
- Q—On what date were they taken?
- Q—Did you, at any time thereafter, have any conversations with the defendant respecting the use of the negative of these photographs?
- Q—How much did you pay for the photographs?
- Q—Were they delivered to you by the defendant?
- Q—Did you receive the negative of these pictures?
(Be prepared to show the nature of any private agreements in writing between the parties.)
- Q—Did you thereafter have occasion to see your photograph upon the premises of the defendant?
(Describe in detail the specific use to which the defendant put the photograph of the plaintiff.)
(Local statutes definitive of the right to privacy should be consulted.)
-

A photographer who makes a picture of a person, at the request of the latter, does not thereby secure the right to make copies or reproductions thereof, without the express consent and permission of the subject of the photograph. *Corliss v. Walker Co.* 57 Fed 434, 31 LRA 283; *Levyreau v. Clements*, 175 Mass 376, 56 NE 735; *Bennett v. Gusdorf*, 101 Mont 39, 53 Pac(2d) 91.

In *Moore v. Rugg*, 44 Minn 28, 46 NW 141, 9 LRA 58, it was held that an implied contract exists between a photographer and his subject that the negative for which the subject sits shall be used only for the specific reproduction requested by the subject, and shall not extend to such use as the photographer seeks to make for his own use and profit.

This rule is based upon the nature of the contractual relationship between the parties, as well as the theory of an intrusion upon the right of privacy. *Moore v. Rugg*, 44 Minn 28, 46 NW 141, 9 LRA 58.

The same ruling has been applied in the instance of a portrait or painting, where the artist seeks to make use of copies thereof for his own profit or exploitation. *Klug v. Sheriffs*, 129 Wis 468, 109 NW 656.

The parties may, however, by agreement permit and authorize use by the photographer or artist of copies of the photograph or portrait, *Luray Caverns Co. v. Kauffman*, 112 Va 725, 72 SE 709, in which event a property right is vested in the party taking the photograph or making the portrait. *Ibid.*

It should further be noted in this connection that the photographer or artist may make a picture for his own purposes, without consulting the subject of the reproduction, and acquire legal title to the negative, with full rights to use thereof, subject only to the rights of privacy granted by law. Annotation: 24 ALR 1322.

But it may be further noted that where a person voluntarily submits himself to the taking of a photograph or portrait, he may have waived his rights to enjoining any use of the negative. Annotation: 9 Ann Cas 1017.

In one case it was held that where the members of a high school class hire a photographer to take a group picture, under which he is to receive as his pay only such amounts as might be paid by individual members of the class for copies of the photograph, property rights to the negative belong to the photographer, who may make such further use of same as he chooses. See 24 ALR 1323, and cases there cited.

It is important in all cases to examine carefully the nature of the relationship between the parties, the circumstances under which the photograph or portrait was taken, and the character of any agreements entered into, whether express or implied.

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PHYSICIAN AND SURGEON, ACTION FOR SERVICES RENDERED

- Q—What is your occupation? A—Physician and surgeon.
- Q—How long have you engaged in this profession?
- Q—During that time have you specialized in any branch of medicine or surgery?
- Q—Are you connected with any institutions?
(State all hospital and university affiliations.)
- Q—How long have you been connected with these institutions?
(Show capacity of witness in each institution.)
- Q—Did you, on or about the 9th day of January, 1944, visit the home of the defendant in this action?
- Q—At whose request did you make this visit?
- Q—Do you recall the exact date of this first visit?
- Q—Did you render any medical services at that time? A—I did.
- Q—To whom were they rendered? A—To John, a son of the defendant.
- Q—Please describe to this court and jury the nature of the services you rendered?
- Q—Was the defendant present at that time?
- Q—What conversations, if any, did you have with the defendant during your first visit?
(Show all facts indicative of a promise to pay, or an acknowledgment of an indebtedness.)
- Q—When did you next visit the home of the defendant?
- Q—What services did you render at that time?
- Q—Describe the condition of the defendant's child at that time?
- Q—How many subsequent visits did you make in this case?
- Q—Describe the condition of the patient at the occasion of your last visit.
(Action based upon express contract.)
(After qualifying witness.)
- Q—Did you, on or about June 1st, 1943, have any conversations with the defendant respecting treatment for himself, or any member of his family?

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Q—State these conversations.

Q—Do you recall the exact date they took place?

Q—Did you thereafter render the services you have just described?

Q—Did you make demand for payment for your services?

Q—Were you paid?

Actions by physicians and surgeons for the agreed amount of a fee for professional services rendered are governed by the broad rules generally applicable to contract actions. Similarly, where the action is based upon the reasonable value of services rendered, the proof and issues are not basically dissimilar from those prevailing in the instance of actions by other professional men, as attorneys. See 41 Am Jur § 141, p 258.

Where a contract is made, either oral or written, for the payment of specified sums upon the rendition of stated services, the physician or surgeon may institute an action to recover upon such contract. Actions falling within this class involve issues not the same as those created in cases of implied contract.

In the latter instance, the proof should develop in full the reasonable value of the services rendered, standing of the physician or surgeon, the intricacy of the ailment for which the services were rendered, and the precise character of the services actually rendered. *Ibid*.

A mere request by an individual to a physician to render services to another, where the person making the request is under no duty or legal obligation to furnish medical care, raises no implication of a promise to pay for the services. *Norton v. Rourke*, 130 Ga 600, 61 SE 478, 124 Am St Rep 187; *Williams v. Brickell*, 37 Miss 682, 75 Am Dec 88; *Hunicke v. Meremac Quarry Co.* 262 Mo 560, 172 SW 43; *Johnson v. Armstrong*, 41 NM 206, 66 Pac(2d) 992.

Local statutory rules should always be consulted in cases of this character. Thus, in the absence of statute to the contrary, the general rule is that a parent requesting medical or surgical services for his infant child, does not thereby create an implied contract so as to bind him to pay for the services actually rendered. *Morrell v. Lawrence*, 203 Mo 363, 101 SW

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571, 120 Am St Rep 660; *McGuire v. Hughes*, 207 NY 516, 101 NE 460; *Broadway v. Jeffers*, 185 SC 523, 194 SE 642.

This rule has been held particularly applicable in those instances where the parent makes no specific request, but merely acquiesces in the rendition of the services. *Blackley v. Laba*, 63 Iowa 22, 18 NW 658, 50 Am Rep 724.

But it is essential in all cases involving the implied contract of a parent to consider and evaluate all the surrounding facts and circumstances. Annotation: 114 ALR 1254.

Thus, it has been ruled that where the physician or surgeon is justified in relying upon the intent of the parent to pay for the services being rendered an infant child, notwithstanding the absence of an express promise to pay, an action may be maintained upon the theory that the parent undertook to pay for the reasonable value of the services to be rendered. *Broadway v. Jeffers*, 185 SC 523, 194 SE 642, 114 ALR 1244.

There is no general or precise rule by which to determine the reasonable value of services rendered by a physician or surgeon. Generally, the measure of value is their worth judged by the standards of the community where the services are rendered; not an arbitrary figure stated by the physician or surgeon himself. *Ely v. Wilbur*, 49 NJL 685, 10 Atl 358, 60 Am Rep 668.

Where the action is based upon the reasonable value of the services rendered, or where a question is raised as to the manner in which specific work was performed, it is well to be prepared with adequate proof in the nature of expert medical testimony. Proof of this character is not conclusive, but where properly presented, may be highly persuasive in its effect upon the jury. *Fowle v. Parsons*, 160 Iowa 454, 141 NW 1049, 45 LRA(NS) 181.

To aid in showing the amount of work performed, and the exact nature thereof, the plaintiff may introduce in evidence books of account or normal record books, to show the dates for visits made, the treatments administered, or any other pertinent facts; provided, of course, that it is adequately shown that the books were maintained in the regular course of the physician's work, and that the entries therein were made during such work. 41 Am Jur § 150, p 264.

It is improper to attempt proof of the patient's financial standing, or his pecuniary ability, in aid of showing the reasonable value of the services rendered. *Morrissett v. Wood*,

123 Ala 384, 26 So 307, 82 Am St Rep 127; *Cotnam v. Wisdom*, 83 Ark 601, 104 SW 164.

But there is also authority for the view that the financial ability of a patient to pay may be shown as one of the factors properly considered in determining reasonableness of a fee. *Levitans Succession*, 143 La 1025, 79 So 829, 3 ALR 1646.

There is ordinarily no specific agreement made between an attending physician or surgeon and the patient (or the person acting on behalf of the patient, as a parent) upon the matter of visits, or the number thereof to be made during the course of treatment. This question is generally allowed to fall within the broad discretion of the physician or surgeon, who may determine the number of visits according to the nature of the ailment and the need for supervision or inspection on his part.

The law recognizes that some ailments or physical conditions will require more extended visits than others, and accordingly allows the physician to make a reasonable determination in this respect. *Ebner v. Mackey*, 186 Ill 297, 57 NE 834.

In the event the number of visits made proves a controversial point in the case, the plaintiff should be prepared to prove, either through his own testimony or that of expert witnesses, that the number of visits made was proper and reasonable under the particular circumstances of that case.

PHYSICIAN AND SURGEON, LIABILITY FOR ACTS OF SUBSTITUTE

A physician is not ordinarily liable for the acts of a substitute that he engages to perform a specific phase of the treatment that he began, or to handle the entire case in his absence. *Stokes v. Long*, 52 Mont 470, 159 Pac 28; *De Forrest v. Wright* 2 Mich 369; *Youngstown Park & Falls Street R. Co. v. Kessler*, 84 Ohio St 79, 95 NE 511; *Moore v. Lee*, 211 SW 214 (Tex), 4 ALR 185.

Thus, it has been held:

"It is not the law that one who contracts to furnish or pay for medical or surgical aid and attention to another is liable, at all events, for the mistakes or incompetency of the physician or surgeon he may employ for that purpose. There must be some neglect or carelessness or misconduct on his part in the performance of his obligations arising under such contract. If he act in good faith and with reasonable care in the selection of the physician or surgeon, and has no knowledge of the incompetence or lack of skill or want of ability on the part of the person employed, but selects one of good standing in his profession, one authorized under the laws of this state to practice medicine and surgery, he has filled the full measure of his contract, and cannot be held liable in damages for any want of skill or malpractice on the part of the physician or surgeon employed." *Youngstown Park & Falls Street R. Co. v. Kessler*, 84 Ohio St 79, 95 NE 511.

"If one physician, upon leaving temporarily the community in which he is engaged in practice, recommends to his patients the employment, in case of need, of some other physician, who is not in any sense in his employment, nor associated with him as a copartner, he is not liable for injuries resulting from negligence or want of skill in the latter, in case he is employed. In such case the employment of the latter is under an independent contract, and he is solely responsible for the result." *Stokes v. Long*, 52 Mont 470, 159 Pac 28.

Elsewhere it is pointed out: "To hold that every person, under all circumstances, would be responsible for injuries committed by another person while employed in his behalf, involves an absurdity no one would countenance. It would create a penalty from which few could escape; for every man is or ought to be, directly or indirectly, nearly or remotely

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engaged in the service or on behalf of his fellowman. But from an examination and comparison of the adjudged cases, the rule now seems very clearly to be this: That where a person employed is in the exercise of an independent and distinct employment, and not under the immediate control, direction, or supervision of the employer, the latter is not responsible for the negligence or misdoings of the former." *De Forrest v. Wright*, 2 Mich 369.

PHYSICIAN OR SURGEON, UNAUTHORIZED OPERATION, ACTION FOR ASSAULT

(See Surgeon, Unauthorized Operation, Action for Assault)

PLAGIARISM OF LITERARY PROPERTY, ACTION FOR

(See Copyright or Literary Property, Infringement of)

PLEDGE OR COLLATERAL SECURITY, ACTIONS INVOLVING

A pledge may be defined as a legal relationship embodying the following characteristics:

- 1—The presence of a valid debt or legal obligation.
- 2—The transfer of specific property to be held as security for the payment of the debt or to be used in actual payment thereof, or in discharge of a legal obligation. See 41 Am Jur § 6, p 586.

A wide variety of property may form the subject of a pledge. Actions involving pledges may revolve around such property as a policy of insurance, *Conway v. Caswell*, 121 Ga 254, 48 SE 956; negotiable instruments, *Griggs v. Day*, 136 NY 152, 32 NE 612; stock certificates, *Bank v. Diebold Safe & Lock Co.* 66 Ohio St 367, 64 NE 518; currency, *Anderson v. Pacific Bank*, 112 Cal 598, 44 Pac 1063; leases upon real estate, *Barton v. Butler County Oil Co.* 112 Kan 436, 211 Pac 608; and mortgages, *Matthews v. Warner*, 145 US 475, 36 L ed 782.

It should be noted in connection with the pledging of intangibles, future interests and expectancies, that the party offering the same as security can convey no greater right or title than he has at the time he makes the transfer. *O'Herron v. Gray*, 168 Mass 573, 47 NE 429.

But where the real owner has acted in such manner as to justify the assumption on the part of another that the party offering the property possesses title thereto, he may be estopped from later asserting his title as against the person who acted in good faith on the appearance of ownership. *Wright v. Solomon*, 19 Cal 64, 79 Am Dec 196.

There is no precise formulae by which a pledge of property, real or intangible, is legally created. It is not, for example, essential that a writing evidence the transaction; it is sufficient if the property is passed to the pledgee, with the intent that it be held as a pledge for a specific debt or legal obligation.

Where a writing is made, it is not essential, in the absence of statute to the contrary, to record such document to give validity to the pledge. But in this connection, it should be noted that since it is impossible to physically transfer incorporeal property, it is necessary that the manual delivery

take the form of a transfer of written evidence of title. *American Pig Iron Storage Co. v. German*, 126 Ala 194, 28 So 603.

The proof in actions involving a pledge should make clear the actual transfer and delivery of the property forming the subject matter of the transaction.

The delivery must be actual or constructive, as without this element there cannot be a valid pledge. Thus, a promise to deliver at some future date, is not sufficient to meet this requirement. The element of possession must be satisfied. *Brewster v. Hartley*, 37 Cal 15, 99 Am Dec 237.

The delivery may, however, be symbolic or constructive, and the question of whether this satisfies the legal requirements depends upon the peculiar facts and circumstances of each case. *First Natl. Bank v. Dearborn*, 115 Mass 219, 15 Am Rep 92.

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POLLUTION OF STREAM, ACTION FOR INJUNCTION

(Injury to lower riparian owner by pollution of stream)

- Q—You are the plaintiff in this action?
- Q—In what business are you engaged? A—Real estate and property development.
- Q—Are you the owner of Hudson Manor estates in the county of Manyard?
- Q—Does this property front the Ashly River at any point?
- Q—For how great a distance does your property front the river?
- Q—To what extent is this property developed at the present time?
- Q—Did you visit your property during the month of June, 1942?
- Q—What, if anything, did you notice unusual about the condition of your property in the vicinity of this river? A—I noticed large quantities of refuse and sewage on the banks, etc.
(Develop in detail such factors as strong odors, menaces to health, unsightly appearance, etc.)
- Q—When was the first time you noticed this condition?
- Q—Did you take any steps to ascertain its source?
- Q—Will you please tell this court what, if anything, you did in this connection?
- Q—And what did you learn as to the source of this condition in the river?
- Q—Whom, if anyone, did you thereafter notify?
- Q—Did you make any other complaint?
- Q—When was the last time you visited your property?
- Q—Tell us what changes, if any, you noticed in the condition of your property at the river area at that time.
(Expert testimony may prove helpful in showing the full extent of the damage sustained, nature of the pollution, as well as more clearly fixing the source.)
(The proof should also disclose the nature of the damages sustained by the plaintiff, both past, existing, and potential.)

An injunction will lie for pollution of a stream by a private

individual or corporation, where a material and irreparable injury will result from continuance of such pollution, or it can be made to appear that the right to the use and enjoyment of unpolluted water has been substantially interfered with or threatened. See following cases:

Indianapolis Water Co. v. American Strawboard Co. 57 Fed 1000; American Tar Products Co. v. Jones, 17 Ala App 481, 86 So 113; Bowen v. Wendt, 103 Cal 236, 37 Pac 149; Lawton v. Herrick, 83 Conn 417, 76 Atl 986; Horton v. Fulton, 130 Ga 466, 60 SE 1059; Barrett v. Mt. Greenwood Cemetery Asso. 159 Ill 385, 42 NE 891, 31 LRA 109; Weston Paper Co. v. Pope, 155 Ind 394, 57 NE 719, 56 LRA 899; Lockwood v. Lawrence, 77 Me 297, 52 Am Rep 763; Rockport v. Elwell, 219 Mass 287, 106 NE 994; Paterson v. Dust, 190 Mich 679, 157 NW 353; Red River Roller Mills v. Wright, 30 Minn 249, 15 NW 167, 44 Am Rep 194; Barton v. Union Cattle Co. 28 Neb 350, 44 NW 454, 26 Am St Rep 340; Worthen v. White Spring Paper Co. 74 NJ Eq 647, 70 Atl 468; Driscoll v. American Hide & Leather Co. 170 NY Supp 21, 102 Misc 612; Annotation: 46 ALR 11.

The threatened pollution of a stream was enjoined in *Rarick v. Smith*, 17 Pa Co Ct 627, 5 Pa Dist R 530, where it was shown that upon a former occasion, when defendant manufactured dynamite, the stream had become so polluted as to kill fish and vegetation, as well as to affect its value as water power by corroding machinery, and that defendant intended to resume his former operations in the same way.

It should be clearly established that no adequate remedy lies at law for the relief demanded; equity will refuse to interfere where it appears that such remedy exists. *Salem Iron Co. v. Hyland*, 74 Ohio St 160, 77 NE 751.

The question as to what constitutes a nuisance or dangerous condition sufficient to invoke equitable powers of restraint depends, of course, upon the facts and circumstances in each case.

Generally, it may be stated that anything which "renders the water less wholesome than when in its ordinary natural state, or which renders it offensive to taste or smell, or that is naturally calculated to excite disgust in those using the water for the ordinary purposes of life, will constitute a nuisance, and for the restraint of which a court of equity will interpose." *Baltimore v. Warren Mfg. Co.* 59 Md 96.

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The proof on the part of the complainant should be such as shows a reasonable and well-grounded fear of immediate, threatened and irreparable injury and loss, as distinguished from results or consequences which may or may not, in the ordinary course of events, follow the acts complained of. *Jes-sup v. Ford*, 6 Del Ch 52, 33 Atl 618.

Obviously, where it can be shown that the complainant has already suffered damage as a result of the pollution, his case for equitable relief is rendered so much stronger. *Woodyear v. Schaefer*, 57 Md 1, 40 Am Rep 419.

The owner of a farm was held in *McKinney v. Emory & H. College*, 117 Va 763, 86 SE 115, entitled to enjoin, as a nuisance, the defendant's pollution of a stream by sewage, where such acts rendered the water unfit for the use of live stock and other domestic purposes, destroyed the value of a spring, and seriously affected the operations and value of the farm, besides being a menace to the health and comfort of plaintiff's family. The moving papers should make clear that the pollution is in existence at the time of the application for injunctive relief, and is not a matter of the past, which may recur in the future.

Bennett v. National Starch Mfg. Co. 103 Iowa 207, 72 NW 507, where the evidence was held to be insufficient to entitle a landowner to enjoin his immediate neighbor's pollution of the river flowing past their lands, where the latter had kept in good order the sewer, which was claimed to have caused the pollution, so that what little pollution had existed was almost wholly removed before the suit was started.

Where the acts are of a continuing nature, as is generally the case with a polluted stream, it is clear that a court of law is powerless to fully and effectively remedy the situation; hence equity will act to prevent further damage and forestall a multiplicity of suits based upon the same series of events. *Harris v. Mackintosh*, 133 Mass 228.

Actual damage need not be shown in order to invoke equitable relief; it is sufficient that such will result in the future.

Thus, it has been held, in enjoining the continuance of a dam which caused polluted waters from sewers to accumulate in a creek, that since the pollution was known to be dangerous to public health and increasing in this danger, a preventive remedy must be granted without waiting for an epidemic to actually occur. *New Castle City v. Raney*, 6 Pa Co Ct 87.

Where it was shown that the continuance of a sewer would seriously affect the health of plaintiff and his family, that he would lose some of his tenants thereby, and that the defendant was insolvent, the farmer was held to be *prima facie* entitled to enjoin the emptying of the sewer into a stream. *Manning v. Webb*, 136 Ga 881, 72 SE 401.

The proof should be explicit in showing the full extent of the damage actually caused by the pollution complained of, or about to be caused thereby. The use of the stream, the involvement of public health or welfare, danger to employees, impairment in value of the property affected or the product manufactured by the complainant, are all factors that should be explored in the proof and preliminary preparation.

It is also essential that the proof show an unreasonable use of the stream on the part of the defendant, or a use at variance with accepted usage and general custom; it is clear that a reasonable and proper use of a stream of water will not be enjoined at the request of someone calculated to suffer a monetary loss as a result thereof.

Hellfrich v. Catonsville Water Co. 74 Md 269, 22 Atl 72, 13 LRA 117, where the court held, in denying an injunction, that a landowner whose cattle befouled a stream in the ordinary way might not thereby be enjoined from polluting the stream, at the instance of one subsequently acquiring the right to use the stream for any purpose, this being a reasonable use of the stream and an incident to the property in the soil.

The size of the stream, distance of complainant's place of business or establishment from the point of pollution, the use to which the defendant is putting the stream, the nature of the pollution, and the possibility of avoiding injury or damage to the complainant by the use of ordinary means, are also pertinent factors that may prove decisive at the trial. *People ex rel. Ricks v. Elk River Mill & Lumber Co.* 107 Cal 214, 40 Pac 486.

The court will not ordinarily grant injunctive relief where it appears that the plaintiff has himself contributed to the pollution of the stream, in a degree not materially removed from the acts of the defendant. *Silver Spring Bleaching Co. v. Wanskuck*, 13 RI 611.

The nature of any contractual provisions relating to the use of the stream by the parties affected, and any statutory pro-

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visions pertinent in this connection, should also be examined in cases of this character. Thus, some decisions have stressed the fact that the pollution complained of constituted a violation of a statute. *Horton v. Fulton*, 130 Ga 466, 60 SE 1059.

It may be noted in this connection that the mere fact that a statutory remedy by indictment is provided in the case of a public nuisance will not deprive the court of its equitable jurisdiction. *Barrett v. Mt. Greenwood Cemetery Asso.* 159 Ill 385, 42 NE 891, 50 Am St Rep 168.

No duty rests upon the complainant to use all measures possible to avert or reduce the pollution created by the defendant's acts; it is clear that the defendant is responsible for the consequences of forces that he has set in motion, apart from any measures that the sufferers may adopt to minimize their damage. *Richmond Mfg. Co. v. Atlantic De Laine Co.* 10 RI 106, 14 Am Rep 658.

POSITIVE AND NEGATIVE TESTIMONY, RELATIVE VALUES

It is a general rule of evidence that positive testimony has a stronger value than negative testimony. Stated differently, where witnesses are of equal credibility, the testimony of one that a certain event took place is of more value than the testimony of another that such event did not take place. Annotation: 98 ALR 161.

The theory behind this view is that the memory of a witness is more reliable when he testifies to the occurrence of an event that he saw.

The nonoccurrence of an event may be testified to simply because the witness was engaged in other work at the time in question or was so situated that he did not listen or watch attentively to the event in question. Ibid.

As stated: "Manifestly the testimony of a witness who does not deny, but merely states that he did not know of or has no recollection of, an occurrence, is not of the same probative value as the testimony of a witness that he was giving attention and that no such occurrence took place. In the former case the attention of the witness may have been so engrossed with other matters that the occurrence passed unnoticed by him or circumstances may have intervened to prevent his acquiring knowledge of the matter. In the latter case the testimony is not properly negative testimony, but positive testimony to the nonoccurrence of the event." 10 Ruling Case Law 1010.

"The fact in issue was whether at a certain time and place certain sounds were produced. Silence is as much a fact as sound, and the proof of one disproves the other. If a witness heard a sound, the necessary implication is that he was where he could hear the sound, but the fact that a witness did not hear a sound carries with it no such implication. Therefore, when it is sought to prove the nonexistence of sound by the testimony of witnesses, the conditions essential to the competency of the evidence must be supplied. The probative value to be given to the fact that a witness did not hear the sound depends upon the condition of his senses, his proximity to the place, the degree of attention, and other such circumstances which render it more or less probable that, if the sound had been made, the witness would have heard it. Hence the mere statement of a witness that he did not hear a bell ring is value-

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less as evidence, unless it further appears that he was able to hear and was in a position and under conditions where he would probably have heard the sound had it been made. The degree of attention will affect the value of the evidence, but the fact that the witness was not giving his direct attention at the time, for the purpose of learning whether signals were given, will not destroy the value of the evidence if he was present at the crossing, was conscious, and in the possession of his ordinary senses, and testifies positively that he heard no signal. The testimony of a witness that he did not hear a bell rung is thus of itself, as against direct and positive testimony of another that the bell did ring, no evidence that it did not ring, but, taken in connection with evidence showing that the witness could and probably would have heard it, had it been rung, and that he was listening to hear it ring, is evidence that it did not ring. The position and situation of the witnesses, the attention they were giving, and their credibility, and the weight of the evidence, are questions for the jury." *Cotton v. Willmar & S. F. R. Co.* 99 Minn 366, 109 NW 835, 8 LRA (NS) 643, 116 Am St Rep 422, 9 Ann Cas 935.

See also *Culhane v. N. Y. C. & H. R. R. Co.* 60 NY 133, holding:

"As against positive, affirmative evidence of credible witnesses to the ringing of a bell or the sounding of a whistle, there must be something more than the testimony of one or more that they did not hear it, to authorize the submission of the question to the jury. It must appear that they were looking, watching, and listening for it, that their attention was directed to the fact, so that the evidence will tend to some extent to prove the negative. A mere, 'I did not hear' is entitled to no weight in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of fact."

PRIVACY, RIGHT OF, ACTION FOR VIOLATION OF

- Q—You are the plaintiff in this action?
- Q—Is the name given in the pleadings in this case as your name the same under which you were known on June 8th, 1944?
- Q—And where did you reside on that date?
- Q—I show you a newspaper, purporting to be a copy of the Times-Herald for that date, and ask you to look at the photograph on page 3. Do you recognize that photograph? A—Yes, it is myself.
(Offered in evidence.)
- Q—I show you now a magazine, purporting to be the Universal Monthly, and ask you if you recognize the photograph on page 19 of this journal.
(Offered in evidence.)
- Q—Did you at any time give your permission or consent to the use of your photograph in any newspaper or journal?
(Objectionable as calling for a conclusion of the witness.)
- Q—Did you at any time have any conversations with the Brown Tobacco Company relative to the use of your photographs in their advertisements? A—No.
- Q—When is the first time that you noticed this advertisement containing your photograph?
- Q—What, if anything, did you do at that time?
(The proof should be clear in establishing the identity of the person photographed as that of the plaintiff, and the absence of any consent, express or implied, to use of such reproduction.)
-

The right of privacy has been variously defined, but essentially it connotes the right to be left alone, or free from undesired publicity. *Brents v. Morgan*, 221 Ky 765, 299 SW 967. But it is obviously impracticable to formulate a precise and all-inclusive definition of the right of privacy; its definition in a specific case depends upon the peculiar facts and circumstances involved.

The courts are not agreed upon the legal basis for a recognition of the right to privacy. According to some authorities, the right is based upon the constitutional guaranties of life, liberty, and the pursuit of happiness. *Melvin v. Reid*, 112 Cal App 285, 297 Pac 91.

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As was stated in one case: "The right to pursue and obtain happiness is guaranteed to all by the fundamental law of our state. This right by its very nature includes the right to live free from the unwarranted attack of others upon one's liberty, property and reputation. Any person living a life of rectitude has that right to happiness which includes a freedom from unnecessary attacks upon his character, social standing or reputation." Ibid.

As expressed elsewhere, a person has as much a right to maintain a life of privacy as he has to refuse to retire into a secluded mode of existence. *Pavesich v. New England Mut. L. Ins. Co.* 122 Ga 190, 50 SE 68.

Thus, it was stated that liberty "includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public. . . . The body of a person cannot be put on exhibition at any time or at any place without his consent. The right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner, is embraced within the right of personal liberty. The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law, is also embraced within the right of personal liberty. Publicity in one instance and privacy in the other is each guaranteed. If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy." Ibid.

According to other authorities, natural law or basic legal concepts apart from the common law or constitutional provisions, underlies the protection of the right to privacy. See 41 Am Jur § 6, p 298.

A few courts hold that the right is in the nature of a vested property right. *Corliss v. Walker Co.* 64 Fed 280, 31 LRA 283.

It should be further noted that some courts reject the theory of any right to privacy, in the absence of specific statutory provisions creating such right. See cases collected in 138 ALR 35.

According to this view, a person has no absolute right to privacy, since the common law, as well as established rules of legal conduct, recognized no cause of action for violation of such right. This view is, however, in the minority. See 41 Am Jur § 8, p 929.

The trend would appear to be unmistakable to the positive view upon this subject, recognizing the right of privacy in a proper case. It would seem that the vast strides made in the art of reproduction, and the extensive publicity that may follow an unwarranted use of a person's name or character, may lead to greater damage under present methods of communication, than in former years. As against this consideration, it is necessary to balance the correspondingly greater freedom to comment and make use of names and events of general public interest.

Editorial license is a public necessity in the interest of free speech and fair comment; precisely where such license assumes the aspect of unfair comment and infringes upon the right of privacy, is dependent upon the facts and circumstances of each case. It thus becomes clear that specific words, phrases or incidents constitute no controlling precedent in determining the actionability of a claim for violation of the right to privacy; what is an unwarranted intrusion in one case may be fair comment in another. *Ibid.*

Reference should always be made to the statutory provisions of the particular jurisdiction relative to the right of privacy, and all decisions explanatory thereof. In some jurisdictions statutes specifically prohibit the use of a name or picture for advertising purposes, without specific permission of the person affected thereby. But it is to be noted that such statute is directed exclusively to the commercial exploitation of the person; it does not cover fair comment during noncommercial communications.

The courts are not in accord on the question whether the right of privacy is purely personal in character, so as to die with the death of the person affected. According to some courts, this right dies with the demise of the person whose privacy has been invaded, so that it cannot thereafter be asserted. But other courts have ruled otherwise, holding that survivors of a deceased person whose right of privacy has been invaded may institute an action to recover damages therefor. See cases collected in 138 ALR 53.

Thus, it has been held that parents may recover for the unauthorized use of photographs of a deceased child. As was stated:

"We do not see how this case can be distinguished from

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those involving the life use of the photograph of a living person, and this has been held actionable. . . . The most tender affections of the human heart cluster about the body of one's dead child. A man may recover for any injury or indignity done the body, and it would be a reproach to the law if physical injuries might be recovered for and not those incorporeal injuries which would cause much greater suffering and humiliation." *Douglas v. Stokes*, 149 Ky 506, 149 SW 849.

It is clear that some persons, by their position in public or private life, invite comment thereupon, so that the right to privacy in such cases is practically non-existent, except to the extent that untruths are stated. Thus, a prominent screen actor, an author, a public official, will naturally draw interest, and the law will not refuse the right to fair comment. Accordingly, it may be stated that such a person has no right of action for intrusion of privacy by reason of the fact that his name appears in a newspaper or other journal. Annotation: 138 ALR 59.

The question of who falls within the class of public characters, so as to justify comment upon his private life, is essentially a factual one, dependent upon the circumstances of each case, no less than the issue of what constitutes fair comment in the case of a public character. *Martin v. F. I. Y. Theatre Co.* 26 Ohio L Abs 67.

"Persons who expose themselves to public view for hire cannot expect to have the same privacy as the meek, plodding, stay-at-home citizen. The glamour, genuine or artificial, of that business, removes the participants therein from the realm of the average citizen. Actresses and actors seek publicity and often adopt various and sundry ways of securing such notoriety as will attract attention to them. . . . This court is of the opinion that any person following the theatrical business for a lifework has no such right of privacy as plaintiff attempts to assert. Her embarkation on this vocation in life has estopped her from a right to be heard to complain that her personal right of privacy has been invaded." *Ibid.*

A trial of an action of the character under discussion may involve many elements not directly connected with the publication of the matter at issue, or damages flowing therefrom. One of the points subject to much dispute will be the precise

character of the use to which the plaintiff's name or photograph was put, assuming it was not a clear-cut commercial use.

A use in connection with a news or historical event will prove difficult in many instances to establish as actionable, particularly where the item published admits of some news value. But it may be shown that the use made was not fair under the circumstances of the case, or was malicious, or that the defendants made no efforts to verify the accuracy of the report, which improperly mentioned the plaintiff's name in connection therewith.

Thus, it is conceivable that mention of a person's name as a relative of a notorious criminal in the casual belief such relation existed, when in point of fact it did not exist, will establish a cause of action against the newspaper publishing such matter, particularly where no reasonable effort was made to verify the story. See 41 Am Jur § 20, p 940.

PROCESS, ABUSE OF
(See Abuse of Process)

SPECIFIC ACTIONS

PROCESS, SERVICE OF, FEDERAL COURTS

The new Rules of Civil Procedure applicable to actions instituted in the Federal courts have worked basic and radical changes in the procedure theretofore prevailing. It should be noted at the outset that process issues in the Federal courts only upon filing of the complaint with the clerk of the district court, and not before. The summons is issued under the signature of the clerk of the court, and under the seal of the court, and is served by a Marshal. The plaintiff's attorney may not serve the process. See Rule 4 of Rules of Civil Procedure.

Where several defendants are to be served, it is necessary to prepare several copies of the complaint for delivery to the United States Marshal. Application may be made at any time for leave to amend the complaint, and such application will generally be granted where it appears that no substantial prejudice will result to the other side.

Service of the summons may be made anywhere within the territorial jurisdiction of the state where the district court is located. Thus, it is possible for a process to be served in a district other than the one where the action is pending.

The question of sufficiency of service of process in an action pending in the Federal courts cannot be determined by laws of the state. Accordingly, service by publication or personally outside the state is not valid, notwithstanding state laws authorize such service under the circumstances of the particular case.

Service of process upon an infant or incompetent person is made by delivering the summons and complaint in the manner prescribed by the laws of the state where such service is made.

In the case of an individual, other than an infant or incompetent person, service is made by the Marshal by delivering a copy of the process to the defendant personally, or by leaving copies thereof at his dwelling place or usual place of abode with a person of suitable age and discretion then residing there. See Rule 4(d) of Rules of Civil Procedure.

The plaintiff may apply to the court, under the rules of practice, for permission to have a person specially designated by the plaintiff effect service of the process, as the local sheriff or his deputy. In such cases the court will designate a specific person to make service. *Ibid.*

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Where the United States is a party to the action, service is made by delivering a copy of the summons and complaint to the United States Attorney for the district in which the action is brought, or to an assistant United States Attorney, or any clerical employee specifically designated by the United States Attorney in writing. A copy of the process is also sent by registered mail to the Attorney General at Washington, D. C.

It may further be noted in this connection that where the action attacks the validity of an order of an officer, or government agency, not made a party, that a copy of the process should be sent by registered mail to such officer or agency.

States or municipal corporations are served by leaving a copy of the process with the chief executive thereof, or by complying with the rules of the particular jurisdiction respecting persons upon whom service of process may be made.

Foreign corporations are served in the following manner, and subject to the conditions set forth herein:

1—The corporation must be doing business in the state where sued.

2—It must be sued in the state and district where the plaintiff resides. If the foreign corporation has qualified to do business within the state and has designated a state officer as agent to receive service of process, service may be made upon such officer.

3—The service must be made upon an agent or officer representing the corporation within the state. Service upon an employee not falling within such category is not sufficient.

Domestic corporations are served by leaving a copy of the process with an officer, managing or general agent, or any other person authorized by local statutes to receive service. As a practical matter, however, decision as to which officer may properly be served does not fall within the province of plaintiff's counsel, but is made by the legal officer upon whom the duty of service devolves.

It may further be noted in this connection that the question as to whether a corporation is doing business within the state, for purposes of making valid service of process, is one of general, not local, law. Thus, the Federal courts will decide for themselves, whether the corporation is doing business within the state so as to vest jurisdiction in a district court upon service of process.

SPECIFIC ACTIONS

PROCESS, SERVICE OF, GENERALLY

While the rules applicable to service of process, and returns generally, are largely defined by statutes and practice of the particular jurisdiction, a few rules of general application may be noted.

Wherever the plaintiff is uncertain of the true spelling of the name of a defendant, or where it appears that the defendant may be known by more than one name, it is well to designate the defendant by all names under which he is, or may be, known. While the misnaming of a defendant may not approximate a fatal defect, it is good practice to avoid later amendments.

Courts have generally followed the rule that a misnomer in a process is not a fatal defect, but one subject to amendment. See 42 Am Jur § 18, p 18. Thus, it has been ruled that a defendant sued by a wrong name, but who has appeared and submitted himself to the jurisdiction of the court, may not set up this error in avoidance of the judgment entered. *Welsh v. Kirkpatrick*, 30 Cal 202, 89 Am Dec 85. A default judgment entered against a defendant who has been served with process, using his wrong name, is valid notwithstanding the misnomer. *Stuyvesant v. Weil*, 167 NY 421, 60 NE 738.

It should be noted that defects in process may assume one of two broad types, either void or voidable. A defect that operates to void a process may not be cured by amendment, *Barton v. Sutton*, 93 Vt 102, 106 A 583; while a defect that merely acts as a voidable error may be subject to amendment and will support a judgment entered, *Houston Oil Co. v. Randolph*, 251 SW 794 (Tex Civ App).

Generally a void process is one that violates a specific statutory provision. Thus, a process served by an infant for whom no guardian has been appointed, where statutes require such appointment before suit may be maintained, is void and no judgment may be validly entered thereon.

The question whether a process directed against a person in his individual capacity may be amended to continue the suit against such person in his representative capacity, depends upon the rules of the practice in the particular jurisdiction, and upon the extent to which such amendment would prejudice the rights of the defendant.

Most courts will allow such amendment, where it appears

that no substantial prejudice to the defendant will result. *Boyd v. United States Mortgage & T. Co.* 187 NY 262, 79 NE 999, 9 LRA(NS) 399, 10 Ann Cas 146. The same general rules would apply in the instance of a process sought to be amended so as to continue a suit against a party in his individual capacity, where originally instituted against him in his representative capacity. See 42 Am Jur § 21, p 23.

The method by which service of process may be effected, as well as the mode of computation, is governed to large extent by local rules of practice. Ordinarily the day of service of process is included in computing the time left for the defendant to answer, and the return day is excluded. In some jurisdictions, the reverse applies, but generally both days are neither entirely excluded nor included at the same time. Intervening holidays and Sundays are included in the computation, and where the last day to answer falls on a Sunday, statutes generally allow the next day to be included in the period of computation. See 42 Am Jur § 27, p 27.

A non-resident who is served within the state by process is deemed legally served, so as to confer jurisdiction upon local courts, notwithstanding he is only temporarily within the jurisdiction. *Vaughn v. Love*, 324 Pa 276, 188 A 299, 107 ALR 1336.

See also Section immediately following for discussion of service of summons in Federal actions under the new Rules of Civil Procedure.

SPECIFIC ACTIONS

PUBLIC OFFICER, LIABILITY FOR ACTS OF SUBORDINATE

Q—You are the plaintiff in this action?

Q—Are you the owner of a business located at 3 Lee Road in this city?

Q—Were you the owner of this business on June 3rd, 1943?

Q—Describe the nature of this business?

Q—Were you in the store on the morning of June 3rd, 1943?

Q—Will you please tell us in your own words what, if anything, happened in your store at that time? A—About ten o'clock in the morning of that day a man appeared in my store with an execution paper and closed the door and locked it, etc.

Q—Did he post any sign or paper on the door of your store? A—Yes.

Q—I show you a paper and ask if you can identify this as the paper that was placed on your door at that time? A—Yes, it is the same paper.

Q—Did you see this paper placed on the door?

Q—And by the same man that exhibited to you the execution papers?
(Offered in evidence.)

Q—I direct your attention to the defendant in the action described in this exhibit, and ask if you are the same person there described? A—No.

Q—Have you ever had any dealings with the person described therein as plaintiff? A—No.

Q—Are you the same person as therein described as judgment debtor in the sum of \$457.67? A—No.

Q—Could you identify the man that appeared in your store at that time?

Q—Did he exhibit any badge, credentials or other evidence of his authority or position?

Q—How long was your store closed?
(The damages should be shown in detail.)

The broad rule is well settled that public officers are not liable for acts of subordinate employees, performed in the course of their official duties. *Brissac v. Lawrence*, 2 Blatchf

121, Fed Cas No. 18,888; *State v. Kolb*, 78 So 817 (Ala), 1 ALR 218; *Carter v. Worcester County*, 94 Md 621, 51 Atl 830; *Central R. & Bkg. Co. v. Lampley*, 76 Ala 365, 52 Am Rep 334.

Thus, a county commissioner who had nothing to do with the performance of an act by a road supervisor in wrongfully procuring the arrest and imprisonment of one who would not work upon the roads, was held not liable for such act of the supervisor. *Carter v. Worcester County*, 94 Md 621, 51 Atl 830.

In another case it was held that the collector of customs is not liable personally for the negligence of a subordinate, where the collector did not personally authorize the act in question or actually participate therein. *Brissac v. Lawrence*, 2 Blatchf 121, Fed Cas No. 18,888.

It has well been stated: "The general proposition that an officer is not liable for the defaults and misfeasances of his clerks or assistants, even though they are appointed by him and are under his control, in the absence of allegation and proof that the officer was negligent or at fault in failing to exercise proper care and prudence in selecting the assistant or clerk, or in failing to properly supervise and superintend the acts and services of such employee in the work for which he was so selected, the doing or failure to do which caused the loss or injury or damage, is well settled. In such cases, in the absence of a special statute or law to the contrary, the assistant or clerk, and his bondsmen, if any he have, are liable but not the officer or his bondsmen. Of course, for this rule to apply, the law must authorize the appointment of such clerk or assistant, so that by virtue of the law and of the appointment the clerk or assistant became in a sense an officer himself. If the superior officer, on his own account, and without authority of the law, should appoint or employ such aid, the former would be liable, the doctrine of respondeat superior applying." *State v. Kolb*, 78 So 817 (Ala), 1 ALR 218.

Elsewhere it has been stated that "neither the Postmaster General nor an assistant or local postmaster, is responsible for the negligence or wilful wrongs of the persons employed in assisting him in the discharge of his public duties and functions. The rule rests on considerations of public policy, and on the ground that such persons are acting in the capacity of public agents, and not as the private agents of the officers.

SPECIFIC ACTIONS

It is conceded that a public officer is liable for his own misconduct or negligence, and for the misconduct or negligence of his subordinates, where he is invested with their selection or appointment, and from carelessness or unfaithfulness appoints incompetent or untrustworthy persons." *Central R. & Bkg. Co. v. Lampley*, 76 Ala 365, 52 Am Rep 334.

It is well to carefully examine the precise character of the acts performed by the subordinate, and which form the basis of the charge, in order to determine to what extent the principal participated in the performance of such acts, and whether the subordinate merely carried out specific orders laid down by the principal.

According to some decisions, where it can be shown that the act in question was substantially the act of the principal, notwithstanding some or all of the physical aspects of its commission were carried out by a subordinate, the principal will be liable as an individual, the same as if he had personally performed such act. See 1 ALR 223.

An administrative officer may readily become liable for the misconduct or negligence of those under him, where such employees were hired by him in his personal capacity and are answerable to him alone. *Ely v. Parsons*, 55 Conn 83, 10 Atl 499.

Thus, where a town official directed a person, not a public officer or upon the public pay roll, to perform certain work upon a road, and left it to the sole discretion of such person as to how the work was to be performed, the town official will be liable for acts of waste committed by such employee. *Ely v. Parsons*, 55 Conn 83, 10 Atl 499.

It should further be noted that a more stringent rule is applied in the case of loss of public funds due to the negligence of the public officer having charge of the custody of such funds. According to some decisions, a public officer is virtually an insurer with respect to public funds entrusted to his care. *United States v. Zabriskie*, 87 Fed 714; *Shelton v. State*, 53 Ind 331, 21 Am Rep 197; *Duluth v. Ross*, 167 NW 485 (Minn); *Fairchild v. Hedges*, 14 Wash 117, 44 Pac 125.

Thus, he is liable in the event that the bank in which the funds are deposited fails, regardless of the degree of care and caution used in his selection of a bank. *Rose v. Douglass*, 52 Kan 451, 34 Pac 1046; *Yawger v. American Surety*,

212 NY 292, 106 NE 64; *Cameron v. Hicks*, 65 W Va 484, 64 SE 832.

The absolute liability of a public officer has been based upon a variety of concepts. According to some courts, he is liable on the broad ground of public policy, and on the theory that a public officer in charge of funds is a debtor to the public at large, and for a default in repayment he must account. *Tillinghast v. Merrill*, 151 NY 135, 45 NE 375. Annotation: 93 ALR 831.

Loss of funds due to fire, theft, embezzlement or similar circumstances has been held not to relieve the public officer from liability. *Yawger v. American Surety Co.* 212 NY 292, 106 NE 64; *Cameron v. Hicks*, 65 W Va 484, 64 SE 832, 17 Ann Cas 926.

This rule is also illustrated in the holding that the clerk of a municipal court is liable for the acts of embezzlement of a subordinate in taking to his own use funds coming into his hands during the course of his official duties. *Duluth v. Ross*, 167 NW 485 (Minn).

It may be pointed out, however, that in some jurisdictions a public officer is regarded as a bailee or trustee of funds entrusted to his care, and is liable only in the event he fails to use ordinary care and caution in the performance of his duties as a bailee or trustee. See cases collected in 43 Am Jur p 114, § 310.

Counsel should scrutinize carefully the nature of the funds involved in cases arising under this classification, as well as their source, to determine whether such funds are in reality public funds, or funds of private citizens, held extraofficially by the public officer.

Where it appears that the funds are not in reality public funds, but moneys which the public officer holds in a capacity other than his public role, the liability is less than that of an insurer, or in any event, not as stringent as if the funds were clearly earmarked as public in character. *District of Columbia v. Petty*, 229 US 593, 57 L ed 1343.

Local statutes definitive of the duties and liabilities of public officers generally should always be consulted and carefully evaluated in the light of the particular case.

It is further held that a sheriff, constable or marshal is liable for the act of a deputy or subordinate who levies an

execution or attachment on the wrong property. *Kroll v. Moritz*, 112 Minn 270, 127 NW 1120; *Curtis v. Fay*, 37 Barb (NY) 64; see also cases collected in 1 ALR 238. Thus, liability has been imposed where a deputy levies execution against a person on the property of another. *Kroll v. Moritz*, 112 Minn 270, 127 NW 1120; *Curtis v. Fay*, 37 Barb (NY) 64; see also cases collected in 1 ALR 238.

In one case it was held that where the goods of a third person were taken by a deputy sheriff under a writ of replevin, the sheriff is personally liable to the party damaged thereby. *King v. Orser*, 4 Duer (NY) 431.

Similarly, a sheriff is liable for an act of a deputy in arresting and imprisoning a person without a warrant, or without probable cause. *Hays v. Creary*, 60 Tex 445; *Deason v. Gray*, 189 Ala 672, 66 So 646.

A line should be carefully drawn, however, between the public or official acts of a deputy, and those which he performs in his personal or private capacity. The sheriff will not be held liable for acts performed by a deputy in the latter capacity. *Robertson v. Smith*, 16 Ga App 760, 85 SE 938.

PUBLIC WORKS CONTRACT, ACTION INVOLVING

The construction of contracts entered into between a public body or municipality and a private contractor are those generally prevailing in the case of ordinary contracts. See 12 Am Jur 485, Contracts. Contracts of this character should be regarded, in the same light as contracts between individuals, and the intentions of the parties ascertained by the same rules. *Hollerbach v. United States*, 233 US 165, 58 L ed 898.

An exception to the broad rules above stated is noted by some decisions in that where such a contract is ambiguous or its meaning doubtful upon certain points, such doubt should be resolved in favor of the public generally. 12 Am Jur 798, Contracts, § 254.

But local statutory provisions definitive of the nature of public contracts, and providing that parties shall stand upon the same footing, will preclude any favoring of the public in the instance of ambiguous contracts. *Lyman-Richey Sand & Gravel Co. v. State*, 123 Neb 674, 243 NW 891.

Unless specifically provided otherwise, time is not ordinarily of the essence in the performance of a public contract, the law implies that the parties intended the contract to be performed within a reasonable time, in accordance with the rules of contract construction generally. Similarly, the question of sufficiency of performance is to be evaluated in the light of the same rules of construction as apply to contracts between private individuals. *Fisher v. Whitham*, 120 Tex 516, 39 SW(2d) 869, 79 ALR 1095; 12 Am Jur 798, Contracts, § 254; 12 Am Jur 881, § 237.

It is a common practice for public works contracts to contain a provision that in the event of disputes, the work may be carried on under the direction of an architect, engineer or other designated person, in order to avoid delay and danger to the public interest. Provisions of this character are valid and fully enforceable. *McGuire v. Rapid City*, 6 Dak 346, 43 NW 706, 5 LRA 752; *Wauwatosa v. Jacobus & Winding Concrete Construction Co.* 223 Wis 401, 271 NW 21.

The further provision is made in such contracts that no payments shall be made to the contractor until he has first secured a certificate of performance by the designated person; such agreement is binding upon the contractor, and the

procurement of such certificate may be regarded as a condition precedent to payment.

Proof of fraud or arbitrary refusal on the part of the person designated as the one to issue the certificate of performance may impel the court to grant relief. *Sweeney v. United States*, 109 US 618, 27 L ed 1053.

It should be noted that courts will not ordinarily read into a contract of the character under discussion a condition that work shall be completed under the supervision of a third person, or that the latter's certificate is a condition precedent to payment; such provisions must be specifically stated, and the intent of the parties in that respect clearly defined. *Mercantile Trust Co. v. Hensey*, 205 US 298, 51 L ed 811.

PUBLIC WORKS CONTRACTOR, LIABILITY FOR DAMAGES

It is generally held that a private contractor performing work pursuant to a contract with a municipality or public body, and upon a public improvement, is not liable for damages to property of third persons as a result of work which he has done in the ordinary and careful discharge of his duties, notwithstanding that such acts would otherwise approximate a nuisance. *Nelson v. McKenzie-Hague Co.* 192 Minn 180, 256 NW 96.

The concept underlying this broad rule is that a contractor engaged in work upon a public enterprise is entitled to share in immunity generally conferred upon a public body from liability for damages incurred in the necessary discharge of a public duty. *De Baker v. Southern California R. Co.* 106 Cal 257, 39 P 610.

See also: **Public Works Contract, Action Involving.**

QUO WARRANTO PROCEEDINGS

Quo warranto is generally employed for the purpose of testing the title or right of a person to public office, or to correct an unlawful or abusive use of a legal franchise. Ordinarily, and in the absence of statutory authority to the contrary, quo warranto is used only when a public wrong is involved; it is not indicated in the case of a private wrong. *Johnson v. Manhattan R. Co.* 289 US 479, 77 L ed 1331; *State ex rel. v. Watkins*, 106 Fla 779, 143 So 638, 86 ALR 240. See also 44 Am Jur p 98, § 18.

A wide variety of acts may serve as the basis of a writ of quo warranto; thus, it has been used in the instance of a violation of gaming laws, liquor laws, or laws affecting combinations in restraint of trade. Annotation: 53 ALR 1041; *State ex rel. Jackson v. Lemp Brewing Co.* 79 Kan 705, 102 Pac 504, 29 LRA(NS) 44; *Watson v. Standard Oil Co.* 49 Ohio St 137, 30 NE 279, 15 LRA 145.

Quo warranto has found common use in those instances where it is sought to test the right or title to a public office, as for example, the ousting of an official who unlawfully holds public office. *People v. Purdy*, 154 NY 439, 48 NE 821, 61 Am St Rep 624; *Nelson v. Gass*, 27 ND 357, 146 NW 537, Ann Cas 1915C 796; *Royall v. Thomas*, 28 Gratt (Va) 130, 26 Am Rep 335.

Local statutory provisions usually govern the issuance of writs of quo warranto. It is usually provided that courts of appellate jurisdiction have original jurisdiction to issue writs of this character. Before a proceeding in quo warranto is instituted, the facts sought to be shown in support of the application should be clearly ascertained, and set forth in the moving papers.

It should also be made clear that all conditions precedent to institution of the suit, such as statutory requirements, have been fulfilled. The facts should also be examined to make sure that the applicant has not, by his acts, waived any rights he might otherwise assert, or estopped himself from proceeding further.

A quo warranto proceeding may be instituted in the name of the state alone, not an individual, and this basic requirement may not be waived by the parties, although statutory provisions vary in the different states with respect to ap-

plications by private persons to the court for leave to institute a quo warranto proceeding. *Wallace v. Anderson*, 5 Wheat (US) 291, 5 L ed 91; 44 Am Jur p 137, § 68.

Thus, in some jurisdictions it is the practice to institute a quo warranto proceeding by petition, prepared and verified in a specified manner, and containing specific jurisdictional statements; and thereafter submit the same to the attorney general of the state, or other specified law officer for the state. Upon receiving the consent of the attorney general to institution of the proceeding, the petition may thereupon be submitted to the appropriate court and argument heard thereupon. *Ibid.*

The proceedings upon argument of the application are largely governed by local statute, which should be closely studied in this connection. The application is addressed to the discretion of the court. *People v. Union Consol. Elevator Co.* 263 Ill 32, 105 NE 12.

SPECIFIC ACTIONS

RAILROAD, FAILURE TO FENCE TRACKS

- Q—You are the plaintiff in this action?
- Q—Are you the owner of the following property?
(Describe in detail.)
- Q—Were you the owner of this property on June 28th, 1944?
- Q—What portion of this property adjoins the railroad tracks owned by the defendant in this action? A—The entire northern side.
(Use of a survey, clearly showing all pertinent factors, is helpful in cases of this character.)
- Q—Did you at any time make any arrangement with the defendant respecting erection of fences along or near the northern side of your property? A—Yes.
- Q—Describe these arrangements. A—The defendant and I agreed that a fence would be erected by the railroad along the northern side of my property, etc.
- Q—With whom were these arrangements made?
- Q—I now show you a paper, dated June 1st, 1943, and ask if you recognize this document? A—Yes, it is the agreement I made with the defendant.
- Q—Did the defendant thereafter erect any fences near the northern side of your property? A—Yes.
- Q—When were these fences erected?
- Q—Describe these fences, as near as you can recall.
- Q—Did you thereafter have occasion to again examine the fences?
- Q—At what date?
- Q—Describe their condition at that time.
- Q—At what other dates did you examine these fences?
- Q—Please describe their condition on each occasion.
- Q—Did you notify the railroad of these facts?
- Q—To whom was such notice given, and upon what dates?
(Proof should show extent of loss, and its proximate relationship to the railroad's failure to properly maintain the fences.)

A railroad is ordinarily under no duty to fence its property or erect cattle or animal guards, unless local statute specifically provides otherwise. Much of the litigation involving lia-

bility of a railroad for damages incurred as a result of its failure to erect fences or other guards, or to maintain existing facilities in proper condition, springs from statutory provisions relating to the carrier's duties in this respect. *Hayes v. Michigan C. R. Co.* 111 US 228, 28 L ed 410; *Bernardi v. Northern P. R. Co.* 18 Idaho 76, 108 Pac 542; *Gorman v. Pacific R. Co.* 26 Mo 441, 72 Am Dec 220.

Statutes of the character above described have been held to constitute a valid exercise of the police power, to the extent that they promote public safety and protect public property. 44 Am Jur p 368, § 153.

Apart from statutory provisions providing otherwise, it is well settled that a railroad is not liable for damages incurred as the result of the acts of animals which strayed from nearby property upon its right of way and thereafter trespassed upon property of other landowners.

It is clear, however, that where a railroad undertakes to contract with an adjoining landowner to maintain fences along the railroad property, and animals belonging to another property owner stray from the railroad right of way to the property of the landowner who contracted for fences, the carrier will be held liable for the resulting damages. *Hanson v. Northern P. R. Co.* 90 Wash 516, 156 Pac 553. Annotation: 24 ALR 1059.

Where the duty to maintain or erect fences does exist, whether by statute or contract, the railroad is under a duty to use ordinary care to see that these safeguards are properly maintained and in good condition. It is not an insurer of the condition of the fences or safeguards that it erects. *Silver v. Kansas City, etc. R. Co.* 78 Mo 528, 47 Am Rep 118; *Antisdell v. Chicago, N. W. R. Co.* 26 Wis 145, 7 Am Rep 44.

* Where it is sought to hold a railroad liable for damages incurred as a result of its failure to properly maintain fences it has already erected, it should be made clear that the defective or dangerous condition existed for such length of time as to impose notice upon the railroad of the hazards involved, and that such span of time was sufficient for the making of necessary repairs, in the exercise of ordinary care.

Thus, evidence that a fence was out of repair for a period of two months, is sufficient to charge the railroad with notice of the defective condition, while a condition of disrepair of a

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few hours might be regarded as an insufficient length of time to charge the railroad with the necessary knowledge. *Illinois C. R. Co. v. Dickerson*, 27 Ill 55, 79 Am Dec 394; 44 Am Jur p 377, § 163.

Proof in actions of the character under discussion should be addressed to the following factors:

1—The precise nature of any statutory provisions relating to the duty of the railroad, and the application of such provisions to the specific facts.

2—The nature of any contractual provisions between the carrier and plaintiff or third person, regarding maintenance or erection of fences.

3—The length of time the defective condition existed.

4—The nature of the defect, its location, the extent of its exposed position, density of traffic, etc.

5—The proximate relationship between the defect or dangerous condition and the damages alleged to have been sustained.

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RAILROAD, MAINTENANCE OF NUISANCE

- Q—You are the plaintiff in this action?
- Q—Where do you reside?
- Q—Do you own this property?
- Q—Were you the owner of this property during the years commencing with 1941 and continuing to the present?
- Q—Describe the character of the surrounding neighborhood at the time you purchased this property? A—It was largely rural, with only two small buildings within a radius of two miles, etc.
- Q—Describe the proximity of the defendant's railroad tracks to your home.
(Use of a survey to fix locations and distances will be found helpful.)
- Q—Describe the character of the railroad's property in the vicinity of your home? A—It was just tracks, etc.
- Q—Did you notice any building or structure used by the railroad near the tracks? A—No.
- Q—Did the defendant thereafter erect any structure on its property, in the vicinity of your home? A—Yes.
- Q—Describe this structure. A—It was a coal shed, etc.
- Q—When was it erected?
- Q—About how far from your property was this coal shed located?
- Q—I show you a photograph, and ask whether this correctly represents the appearance of this coal shed? A—Yes.
(Offered in evidence.)
- Q—Describe what changes, if any, the presence of this coal shed made in the surrounding air. A—The air was filled with coal dust particles, etc.
(Describe the effects of the nuisance in detail, showing such factors as noise, dust, smoke, etc.)
- Q—How long did this condition continue?
- Q—Now please tell this court and jury the nature of the surrounding neighborhood at the time this coal shed was erected. A—It was residential, etc.
- Q—How many houses had been erected on your particular block?

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Q—I show you a photograph, and ask if it correctly shows the appearance of Hill Street, as it now stands? A—Yes.
(Offered in evidence.)

Q—I show you another photograph, and ask if it correctly shows the appearance of your home as it now stands?
(Offered in evidence.)

Q—Describe the appearance of your home prior to the erection of this coal shed.

(Questioning of Surveyor)

Q—You are a registered surveyor?

Q—Did you, on or about the 3rd day of May, 1944, survey property located at Hill Street in the vicinity of the Erie Railroad crossing?

Q—At whose request did you make this survey?

Q—Did you thereafter make a survey based on your measurements?

Q—Is this the survey you made at that time?

Q—To what scale is it drawn?

Q—Did you make any notes at the time you made this survey?
(Offered in evidence.)

(The witness may explain any markings on the drawing.)

Ordinarily a railroad is not liable on the theory of nuisance for damages caused by the operation of a facility properly constructed and maintained, as for example a repair shop, terminal or enginehouse. *Taylor v. Seaboard Airline R. Co.* 145 NC 400, 59 SE 129, 122 Am St Rep 455.

But there is authority for the view that where a railroad has discretion in the location of a facility, and exercised this discretion in such manner as to unnecessarily cause annoyance and inconvenience to the public, it may be enjoined from continuance of the nuisance. *Southern R. Co. v. Fisher*, 140 Tenn 428, 205 SW 126, 6 ALR 717.

The question as to what constitutes a nuisance is dependent upon the facts and circumstances in each case; general rules are merely a guide to the evaluation of the factors determinative of the issue in a specific case. Thus, the use of a railroad shop or train in such manner as to cause smoke to issue in large and offensive quantity may well be regarded as a

nuisance where the railroad facility is located close to a residential district, and could have been placed elsewhere in the discretion of the carrier. 44 Am Jur p 465, § 243.

The same condition will be regarded as less than a nuisance where its existence is a necessary part of the maintenance of the railroad's facilities. *Taylor v. Seaboard Airline R. Co.* 145 NC 400, 59 SE 129, 122 Am St Rep 455.

It has been held that a railroad is liable for damages on the theory of nuisance where it locates its yards, machine shops or other structure so near to residential property as to impair the value thereof with smoke, cinders and dust—it appearing further that the railroad could have located such structures at a place where such results would not have obtained. *Choctaw, etc. R. Co. v. Drew*, 37 Okla 396, 130 Pac 1149, 44 LRA (NS) 38.

It has been held that the following do not constitute nuisances:

1—The mere shifting of railroad cars, performed in the ordinary course of normal operation, notwithstanding the noise involved.

2—The construction of a railroad bed, track, or facility, where done under proper or normal conditions.

3—Operation of rolling stock in general, where done with due care.

4—The transportation of explosives, if not accompanied by unnecessary risks.

5—The mere operation of a railroad upon a public street or highway, where such use was legal in its inception.

6—The blocking of a road or street, unless for an unreasonable length of time.

See cases collected in 44 Am Jur p 573, §§ 358 et seq.

A typical instance of actionable nuisance is where a railroad acquires property, and holds same until a period of several years elapses when the surrounding neighborhood changed from rural to residential, at which time the railroad decides to erect coal sheds upon its property, thereby causing coal dust, dirt and loud noises to depreciate the value of the adjoining property. *Wylie v. Elwood*, 134 Ill 281, 25 NE 570, 9 LRA 726.

The proof in cases of this character should make clear the character of the surrounding land and neighborhood, the prox-

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imity of houses and other buildings to the nuisance complained of, the length of time such nuisance existed, and the nature of the damage suffered as a result thereof.

Where it is possible to show the manner in which the railroad could have lessened the effect of the nuisance complained of, as by adoption of better safeguards, such proof should be presented.

The rule is stated that stockyards and animal pens are not necessarily nuisances which a court will enjoin where they have been properly erected and are being properly maintained. 44 Am Jur p 467, § 245.

Factors to be considered in this connection are the nature of the surrounding neighborhood, and the length of time the nuisance has existed, viewed from the character of the section when the stockyards and pens were first erected. Ibid.

The measure of damages in cases of the character under consideration may be stated to be the value of the depreciation in the market price of the property affected, but only in those instances where the damage is permanent in nature. *Choctaw, etc. R. Co. v. Drew*, 37 Okla 396, 130 Pac 1149, 44 LRA(NS) 38. Where the damage is transient in nature, as where it would cease to exist upon removal of the nuisance or a lessening in its effects, the measure of damages is the actual loss sustained. *Galveston, etc. R. Co. v. De Groff*, 102 Tex 433, 118 SW 134, 21 LRA(NS) 749. In some instances this might mean the extent of diminution in rental value of the property affected.

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RESTRICTIVE COVENANT IN EMPLOYMENT OR SALES CONTRACT

- Q—You are the plaintiff in this action?
- Q—In what business are you engaged? A—In the plastic business.
- Q—What products do you manufacture? A—Plastic accessories for the hardware trade.
- Q—How long have you been engaged in this business? A—Six weeks.
- Q—From whom did you purchase this business? A—The defendant, John H. Cary.
- Q—When did you purchase the business?
- Q—At that time, did you enter into any written memoranda with the defendant respecting the sale and purchase of this business? A—I did.
- Q—I show you a document dated February 4th, 1944, and ask if that is the memoranda you referred to?
- Q—I ask you to look at the signature on this paper, and tell me if you recognize it as your own?
- Q—Do you recognize the other signature?
- Q—Did you see the defendant sign this paper?
(Offered in evidence; counsel should read to the jury such parts as pertain to the restrictive covenant not to engage in a similar business.)
- Q—On what date did you take possession of the business?
(Describe the nature of the business in detail, showing any peculiar skills required in its operation, as well as any secret or carefully guarded formulae used in any processing operation.)
- Q—Did you thereafter continue active operation of this business?
- Q—Do you know, of your own knowledge, whether the defendant in this case has engaged in the operation of a similar business since your purchase of his plant?
(Describe in detail the extent to which the defendant has engaged in a similar business, when such violation first began, and the extent of damage, if any, resulting to the plaintiff as a result thereof.)

Courts will, in some cases, uphold the validity of contracts

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between employer and employee which provide that the latter shall not accept employment from third persons during the pendency of the contract, or that he shall not for a stated period of time after termination of the contract accept employment from others or engage in a similar business. *Eureka Laundry Co. v. Long*, 146 Wis 205, 131 NW 412, 9 ALR 1456. Annotation: 9 ALR 1456.

Some courts have drawn a distinction between contracts forming part of the sale of a business, as by requiring the seller to refrain from engaging in the same business for a stated period of time or within a prescribed area, and contracts requiring an employee to work for a single employer, to the exclusion of all other persons. *Styles v. Lyon*, 87 Conn 23, 86 Atl 564.

In one case, the court pointed out, in discussing the right of persons to choose their own work, that this right "is their fortune, constituting the only means they have to obtain food, raiment, and shelter, and to acquire property. To such persons, a deprivation of this right is ruin, and to abridge it is to do them an injury which will very likely result in their ruin. When, therefore, a court is asked either to deprive a person of this right or to abridge it, it is its duty, before it acts, to consider with the utmost care whether, if it does what it is asked to do, it will not, on a careful comparison of consequences, do more injustice than justice. The defendant, it is true, has broken his contract, but that fact, standing alone, presents no ground whatever for the interference of this court,—indeed, scarcely more than would be presented by a case where the ground of action was a breach of warranty made on the sale of a horse." *Sternberg v. O'Brien*, 48 NJ Eq 370, 22 Atl. 348.

Elsewhere it is stated: "Under the law, restrictive stipulations in agreements between employer and employee are not viewed with the same indulgence as such stipulations between a vendor and vendee of a business and its good will. In the latter case, the restrictions add to the value of what the vendor wishes to sell, and also add to the value of what the vendee purchases. In such cases also the parties are presumably more nearly on a parity in ability to negotiate than is the case in the negotiation of agreement between employer and employee. In a restrictive covenant between a vendor of a busi-

ness and the vendee, a large scope for freedom of contract and a correspondingly large restraint of trade are allowable. In a restrictive covenant between employer and employee on the other hand, there is small scope for the restraint of the right to labor and trade and a correspondingly small freedom of contract."

"In dealing with a restrictive stipulation between an employer and an employee, . . . in order that the court may uphold and enforce the restriction, if it is not otherwise contrary to public policy, the court must find that the facts alleged disclose a restriction on the employee reasonably necessary for the fair protection of the employer's business or rights, and not unreasonably restricting the rights of the employee, due regard being had to the interests of the public and the circumstances and conditions under which the contract is to be performed." *Samuel Stores v. Abrams*, 108 Atl 541 (Conn), 9 ALR 1450.

According to some authorities there is no appreciable difference between the two types of contractual provisions. As stated in one case: "The question arises, Does it make any substantial difference whether the thing of value bargained for is contained in a contract of sale, or in a contract of hiring? If it is lawful and proper to protect a business just about to be acquired from certain acts by the seller, who is familiar with such business, why is it not equally lawful and proper to protect an established business from such acts by one who has become familiar therewith? We perceive no difference in principle. The purchaser says to the seller: 'You are familiar with this business. You know your customers; your personal acquaintance with them is such that you could divert their trade from me if you saw fit. Now, I will purchase your business upon the express condition that you will agree for a limited length of time not to engage in a like business in this locality; at the expiration of that time I shall know my business and my customers well enough to be able to protect myself.' So the owner of an established business says to a prospective employee: 'In the employment, you will become familiar with the customers of my business in a way that I cannot; you will meet them frequently, while I see them rarely, if ever. Now, I will hire you upon the express condition that you will agree for a limited length of time not to solicit trade from such of my customers as you may have supplied while in my employ,

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and will not engage in my business within a limited time, in the territory you have occupied; at the end of that time my new employees will be sufficiently well acquainted with my customers, to protect my business.' Why is not one contract as valid as the other? Both are based upon valuable considerations. If it be said that the latter contract tends unreasonably to hamper employees in their quest for employment, the answer is: Whatever is reasonably necessary for the protection of a legitimate business promotes the best interests of the employees of that business. No doubt experience has shown that owners of a business like that of plaintiff need such protection in a large city, where the customers, as a rule, come in contact only with the employee, and that his personality and acquaintance with them have much to do with the retention of their patronage. Freedom to contract must not be unreasonably abridged. Neither must the right to protect, by reasonable restrictions, that which a man by industry, skill, and good judgment has built up, be denied. If the restrictions are not otherwise contrary to public policy, they must be held to be valid when they appear to be reasonably necessary for the fair protection of the employer's business or rights, and do not unreasonably restrict the rights of the employee, due regard being had to the subject-matter of the contract, and the circumstances and conditions under which it is to be performed." *Eureka Laundry Co. v. Long*, 146 Wis 205, 131 NW 412, 9 ALR 1456.

Actions based upon the breach of a contract of employment not to engage in similar work for another person should show that the services of the employee are of an extraordinary or unique character, for which a substitute cannot be readily engaged. Annotation: 9 ALR 1461.

In actions based upon breach of a contractual provision not to engage in a similar business for a stated period of time, or in a prescribed area, the plaintiff should be prepared to show that the defendant is able to take unfair advantage of specialized knowledge and valuable information about the plaintiff's business, and use same to his own or another's advantage by capitalizing upon same, to the damage of the plaintiff, and in violation of a specific contract covering this point. *Magid v. Tannenbaum*, 149 NY Supp 445, 164 App Div 142; Annotation: 9 ALR 1461.

"A restrictive agreement, providing that the defendant,

while connected with a competing business, should not solicit trade from persons who were customers of the plaintiff at the branch store where the defendant was employed during his employment, might reasonably be claimed to be such a restriction as is reasonably necessary for the fair protection of the plaintiff's business." *Samuel Stores v. Abrams*, 108 Atl 541 (Conn), 9 ALR 1451.

The need for such proof is illustrated in the holding that a traveling salesman in the clothing business will not be enjoined from entering another's employ within a year after terminating his relation with the plaintiff, in violation of a contract provision prohibiting such employment, where the proof failed to disclose that the defendant's services were unique, or that the employee secured secrets about the plaintiff's business which he was using to the latter's damage. *Magid v. Tannenbaum*, 149 NY Supp 445, 164 App Div 142.

A suggested test to measure the validity of a covenant not to engage in a similar or competing business after termination of an employment contract is stated as follows:

"If the restraint affords to the person in whose favor it is imposed nothing more than reasonable protection against something which he is entitled to be protected against, then, as between the parties concerned, the restraint is to be held to be reasonable in reference to their respective interests; but, notwithstanding this, the restraint may still be held to be injurious to the public, and therefore void; the onus of establishing to the satisfaction of the judge who tries the case, facts and circumstances which show that the restraint is of the reasonable character above mentioned, resting upon the person alleging that it is of that character, and the onus of showing that, notwithstanding that it is of that character, it is nevertheless injurious to the public, and therefore void, resting in like manner on the party alleging the latter." Annotation: 9 ALR 1467.

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RESTRICTIVE COVENANTS, CHANGED CONDITIONS

Q—You are the plaintiff in this action?

Q—Are you now the owner of any property located within the subdivision of this city known as Bellair Heights?

Q—Please describe the nature and extent of this property.

Q—What part of this subdivision did you own in the year 1928? A—The entire subdivision.

Q—Did you thereafter convey any part of this tract of land? A—I did.

Q—What was the date of your first conveyance, and to what purchaser?

Q—I show you what purports to be a certified copy of a deed and ask if you recognize this document? A—It is the deed to the first conveyance I made from this tract.

Q—I direct your attention to Clause “eight” of the deed, and ask whether any subsequent deeds contained this same clause?

(This type of question may properly be objected to, as calling for a conclusion upon a matter best shown by proof of the subsequent deeds.)

(The proof should make clear the existence of a common or general scheme, consistently followed, for the preservation of the character of the neighborhood.)

Q—Will you please describe the character of the subdivision at the time of the first conveyance?

Q—And will you describe the same property at the present time?

Q—Did you, at any time, enter into any arrangement or agreement with any owner of property in this subdivision permitting use of a residence for business purposes?

Q—I show you a photograph of Grant Street within Bellair Heights and ask if it fairly represents the appearance of this street at the present time?

(Marked in evidence.)

(The character of the alleged violation should be established in detail.)

Q—I show you a photograph, purporting to represent the front of premises purchased by the defendant, and ask if it fairly represents the appearance of this property at the present time?

(Marked in evidence.)

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Q—Will you now describe this property, as near as you can recall, at the time of its conveyance to the defendant?

The question of change in neighborhood as affecting the enforcement of a restrictive covenant depends largely upon the status of the complainant and his relationship to the subject matter, and the purpose behind the covenant involved. It has been pointed out that restrictive covenants may fall into three classes:

1—A covenant made solely for the general enjoyment or benefit of the vendor.

2—A covenant made for the benefit of the vendor in his enjoyment of a particular piece of property.

3—Covenants for the benefit of other purchasers, as where the property sold is part of a general building scheme.

The general tendency of the courts is to relax the restriction of a restrictive covenant where it appears that conditions have so changed as to make unreasonable and unnecessarily burdensome a strict construction of the original covenant. *Ewertsen v. Gerstenberg*, 186 Ill 344, 57 NE 1051, 51 LRA 310; *Miller v. Ettinger*, 235 Mich 527, 209 NW 568; *Compton Hill Improv. Co. v. Strauch*, 162 Mo App 78, 141 SW 1159; *Ocean City Asso. v. Chalfant*, 65 NJ Eq 156, 55 Atl 801; *Roth v. Jung*, 79 App Div 1, 79 NY Supp 822; *Fortsmann v. Joray Holding Co.* 244 NY 22, 154 NE 653; *Starkey v. Gardner*, 194 NC 74, 138 SE 408, 54 ALR 809; *Ronberg v. Smith*, 132 Wash 345, 232 Pac 283; *Ward v. Prospect Manor Co.* 188 Wis 534, 206 NW 856, 46 ALR 364.

As has been stated:

“Courts of equity will not enforce such restrictive covenants, where the character of the neighborhood has so changed as to make it impossible to accomplish the purposes intended by such covenants. This may result from circumstances over which neither plaintiff, nor defendant, nor other resident of the community, has any control, as where the erection of a steam railway and the construction of a station rendered the neighborhood, and especially defendant's property, in front of which the station was erected, unfit for use for residential purposes, to which it was intended to confine the restricted area. Such changed conditions may result from the natural growth of the city, bringing industry, smoke,

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soot, and traffic into such close proximity to the restricted area as to render it undesirable for the purposes to which it is restricted. Such changed condition may also result from a failure on the part of the property owners to observe or comply with the terms of the covenant. These violations may be so general as to indicate a purpose and intention on the part of the residents of the community to abandon the general scheme or purpose. Under such conditions, courts of equity will not enforce the covenant." *Starkey v. Gardner*, 194 NC 74, 138 SE 408, 54 ALR 807.

In one case the court refused to enforce a restrictive covenant in deed of lots in a residential neighborhood, so as to prevent the construction of business structures, where it appeared that the tract had changed from a residential to a business district, and that approximately eighty per cent of the property owners had waived or abandoned the restriction. *Starkey v. Gardner*, 194 NC 74, 138 SE 408, 54 ALR 807.

Elsewhere it has been pointed out that where enforcement of a restrictive covenant would confer no benefits under the existing circumstances upon the property owners, but would cause heavy loss to the defendants, equity will refuse to enforce such covenant. *Forstmann v. Joray Holding Co.* 244 NY 22, 154 NE 653.

"Equity will not, as a rule, enforce a restriction, where, by the acts of the grantor who imposed it, or of those who derived title under him, the property, and that in the vicinity, has so changed in its character and environment, and in the uses to which it may be put, as to make it unfit or unprofitable for use if the restriction be enforced, or where to grant the relief would be a great hardship on the owner and of no benefit to the complainant, or where the complainant has waived or abandoned the restriction; or, in short, it may be said that where, from all of the evidence, it appears that it would be against equity to enforce the restriction by injunction, relief will be denied, and the party seeking its enforcement will be left to whatever remedy he may have at law." *Ewertsen v. Gertenberg*, 186 Ill 344, 57 NE 1051, 51 LRA 310.

In *Starkey v. Gardner*, 194 NC 74, 138 SE 408, 54 ALR 807, it was pointed out:

"The weight of authority is to be the effect that, if substantial, radical, and fundamental changes have taken place in a

development protected by restrictive covenants, courts of equity will not enforce the restriction. The underlying reason is, we apprehend, that such changes destroy the uniformity of the plan and the equal protection of the restriction. For instance, if a residential development should, in the course of time, by the growth of a city or other cause, become valuable as business property, and business houses should indiscriminately invade the development, then the restriction would bear unequally upon the various owners, and equity would not permit the entrenching of such inequality."

The rationale behind the rule enforcing restrictive covenants in the case of a general building or residential plan, is well stated in the following summary:

"The question of restrictive covenants in deeds covering property designed for residential purposes exclusively is becoming more and more an important and perplexing proposition. In all of the larger cities of the state, suburban developments are multiplying, and the popularity of these developments rests upon the assurance given purchasers that they may confidently rely upon the fact that the privacy of their homes will not be invaded by the encroachment of business, and that they may further be assured that the essential residential nature and character of the property will not be destroyed. Upon this assurance, our citizens are daily erecting and constructing expensive and comfortable homes, away from the noise and stress of city life, and, moreover, where they can secure larger home sites for their residences and more playing space for their children. The fundamental theory upon which these developments are founded is that of equality of burden and equality of privilege; that is to say, each property owner is entitled to the same privilege from the encroachment of undesirable buildings or enterprises, and therefore each property owner is subjected to the same burden or obligation of doing nothing, or permitting nothing to be done, to change the essential character of the community plan. This security and freedom ought not to be destroyed by slight departures from the original plan, guaranteed and safeguarded by the restrictive covenants in the deeds under which the property is held. Nor should a property owner be held to have waived his rights, and to have

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abandoned the protection conferred upon him by such covenants, by reason of disconnected and immaterial violations of the restrictions in the conveyances." *Starkey v. Gardner*, 194 NC 74, 138 SE 408.

The rule has been stated elsewhere to be that "where a vendor sells off an estate in lots, with restrictions upon the use of the lots sold, he will lose his right in equity to enforce the restrictions against one grantee, if he has knowingly permitted other grantees to violate the same restrictions, the effect of which violation is to abrogate the purpose of the restriction and alter the general scheme intended to be conserved by it. This rule is applicable whether the suit is brought by the covenantee or by one of several grantees of land sold in accordance with the general scheme by the original covenantee. It rests upon the equitable ground that if anyone who has a right to enforce the covenant, and so preserve the conditions which the covenant was designed to keep unaltered, shall acquiesce in material alterations of those conditions, he cannot thereafter ask a court of equity to assist him in preserving them. The complainant may be in privity with the defendant, and have his action at law for a breach of covenant, but nevertheless in this situation a court of equity will not assist him." *Ocean City Asso. v. Chalfant*, 65 NJ Eq 156, 55 Atl 801.

In *German v. Chapman*, LR 7 Ch Div (Eng) 271, it was stated that if "there is a general scheme for the benefit of a great number of persons, and then, either by permission or acquiescence, or by a long chain of things, the property has been entirely or so substantially changed as that the whole character of the place or neighborhood has been altered, so that the whole object for which the covenant was originally entered into must be considered to be at an end, then the covenantee is not allowed to come into the court for the purpose merely of harassing and annoying some particular man, where the court could see that he was not doing it bona fide for the purpose of effecting the object for which the covenant was originally entered into."

A change in an isolated portion of a large tract will not ordinarily constitute a sufficient alteration of a vicinity to prompt equitable disregard of the prohibitions of a restrictive covenant. *Barton v. Slifer*, 72 NJ Eq 812, 66 Atl 899; *Laverack v. Allen*, 130 Atl 616 (NJ Eq).

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“Changes in the residential neighborhood depend upon their number and character, and if, as in this case, they do not interfere with the enjoyment by lot owners of the benefit of the neighborhood as a place of residence, or show a general intention to abandon such plan, they are not material.” *Lavarack v. Allen*, *ibid.*

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SAFE-DEPOSIT BOX, ACTION INVOLVING USE OF

- Q—You are the plaintiff in this action?
- Q—Did you have any conversations with any official of the defendant in this action on or about January 3, 1944?
- Q—Describe the nature of these conversations. A—I inquired as to the cost of renting a safe-deposit box, and was told as follows: etc.
- Q—With whom were these conversations held? A—Mr. Robert Frost, treasurer of the Safe Deposit Company.
- Q—Do you recall the exact date of such conversations?
- Q—Where were they held? A—At the office of the defendant on 346 Huron Street.
- Q—Did you thereafter enter into any agreement with the defendant respecting a safe-deposit box?
- Q—I show you a paper, dated January 3rd, and ask if you recognize this document? A—I do; it is a paper I signed at that time.
(Offered in evidence.)
- Q—Did you thereafter receive a safe-deposit box?
- Q—What was the number of this box?
(Describe location of box, size and general character.)
- Q—What was the agreed price for use of this box?
- Q—When was the first time you made use of the box?
- Q—Describe the procedure that took place before you gained access to the box.
- Q—What, if anything, did you deposit in the box at that occasion.
(Show in detail the nature of the property left in the safe-deposit box.)
- Q—Did you make any further deposits in the box?
(Upon what dates?)
- Q—What property did you place in your box at that date?
(Show in detail the dates upon which plaintiff made use of the box, for a reasonable period prior to the discovery that the property was missing.)
- Q—What part of this property, if any, did you withdraw from the box?
(Upon what dates?)
(Show circumstances surrounding discovery of absence of property.)
-

The relationship of bailee and bailor is created in those instances where a person engages or hires a safe-deposit box, and becomes the lessee thereof by retaining the key and taking possession and control of the box. *Schaefer v. Washington Safety Deposit Co.* 281 Ill 43, 117 NE 781; *Re Conneautville Banks Estate*, 280 Pa 545, 124 A 745; *West Cache Co. v. Hendrickson*, 56 Utah 327, 190 P 946.

See also *Carples v. Cumberland Coal, etc. Co.* 240 NY 187, 148 NE 185, where the court stated as follows: "It is true that there has been much discussion of the relationship between safe-deposit companies and their box customers, and of the question whether property thus placed is in the possession and control of the safe-deposit company, or of the customer . . . and possibly different answers may be made to this question." The court thereafter intimated that the relationship might well be that of landlord and tenant.

The fact that the party hiring the box retains possession of the key, and that only he may have access thereto, does not ordinarily change the nature of the relationship between him and the owner of the box; it still remains that of bailor and bailee. *Schaefer v. Washington Safety Deposit Co.* 281 Ill 43, 117 NE 781; *National Safe Deposit Co. v. Stead*, 250 Ill 584, 95 NE 973.

While it would seem at first glance that the exclusive possession and control by the person using the box would destroy one of the essential aspects of the bailee and bailor relationship, the courts have maintained with a fair degree of uniformity that the parties stand as bailor and bailee. *Ibid.*

In accordance with the prevailing rules respecting liability of a bailee for acts of negligence resulting in loss of, or damage to, the bailed property; or in the absence of acts of negligence, liability for mere loss by theft, fire or other circumstances, it has been held that the bailor is not an absolute insurer of the safety of articles or property placed in the safe-deposit box by the user thereof. *Roberts v. Stuyvesant Safe Deposit Co.* 123 NY 57, 25 NE 294.

See Bailment, Action Upon.

The law holds the bailee to the same degree of care as prevails in the case of the ordinarily bailment, and this means the exercise of reasonable care and foresight under the circumstances of the particular case, extending to the selection

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and hiring of employees, maintenance of the box, safeguards adopted against fire, theft and other possible causes of damage or loss, and mistakes in identity of persons entitled to use of the safe-deposit box facilities. *Mayer v. Brensinger*, 180 Ill 110, 54 NE 159, 72 Am St Rep 196; *Jones v. Morgan*, 90 NY 4, 43 Am Rep 131; *Safe Deposit Co. v. Pollock*, 85 Pa 391, 27 Am Rep 660; *Sporsem v. First Natl. Bank*, 133 Wash 199, 233 Pac 641. See also 6 Am Jur § 461, p. 487.

The measures to be adopted are obviously proportioned to the exigencies of each case. In some instances it is clear that normal and reasonable safeguards may prove unavailing to prevent a theft or other loss. Thus, it has been held that where a safe-deposit company installs a vault, with doors and lock mechanism of the type regularly used by banks and safe-deposit companies for protection of valuables, it is not liable for theft of property contained in a safe-deposit box where burglars used high explosives to gain entrance to the premises. *Morgan v. Citizens Bank*, 190 NC 209, 129 SE 585.

The duty of reasonable and prudent care extends to the admittance of persons to the premises where safe-deposit boxes are kept. Here again, the law does not make the bailor an absolute insurer, so as to impose liability in all cases where unauthorized persons gain access to a safe-deposit box, but will hold the bailor liable for loss through an error in identification only where such error is due to a lack of reasonable care under the circumstances of the particular case. *Mayer v. Brensinger*, 180 Ill 110, 54 NE 159, 72 Am St Rep 196.

Upon death of the user of a safe-deposit box, the bailee is under a duty to surrender the contents only to accredited representatives of the deceased, and none others. Where the safe-deposit company delivers the property before appointment of the proper representative of the deceased, it will be held liable. *National Safe Deposit Co. v. Stead*, 232 US 58, 58 L ed 504.

In some instances, the safe-deposit company will insert a provision in the contract creating the relationship of bailor and bailee, to the effect that opening of the box shall not be inferred from loss of the contents. It has been held that such a provision will not operate to bar a cause of the action for loss of, or damages to, property placed in a safe-deposit box; but that the liability of the bailee must be determined by the

principles generally applicable to bailments generally, and not by special rules. *Schaefer v. Washington Safety Deposit Co.* 281 Ill 43, 117 NE 781.

A cause of action is stated in a pleading which alleges no more than the contract entered into between the parties, the deposit of the property in the safe deposit box, and the failure of the bailee to return the property upon due demand, in accordance with the terms of the contract. *McDonald v. Perkins*, 133 Wash 622, 234 Pac 456.

The initial burden of proof remains, of course, with the plaintiff who makes specific allegations respecting loss of the property. He sustains this burden, at least for the purpose of establishing a prima facie case, by showing the making of a valid contract, and failure of the bailee to comply with the demands of the bailor for possession of the property left in the safe-deposit box. *Schaeffer v. Washington Safety Deposit Co.* 281 Ill 43, 117 NE 781; *Safe Deposit Co. v. Pollock*, 85 Pa 391, 27 Am Rep 660.

The burden of explanation thereupon shifts to the defendant who must come forth with evidence showing that the absence of the property involved is not due to any act of carelessness on his part, but is attributable to factors not within his control or against which he was under no duty, in the exercise of reasonable care, to guard against. *Ibid.*

A wide variety of proof is admissible in actions involving loss of property left in a safe-deposit box. Thus, it has been held that evidence is admissible which tends to show the customary practice of safe-deposit companies, condition and character of the premises, the circumstances surrounding deposit of the property in the safe-deposit box, as well as devices and methods used by other institutions to prevent loss of property in a safe-deposit box. 6 Am Jur § 425, p 492.

The proof presented by the plaintiff should cover all essential aspects of the case, such as the precise circumstances surrounding creation of the contract between the parties, the terms thereof and all written evidence of same, the dates upon which the property was deposited in the safe-deposit box, the manner in which the property was placed into the box and access secured thereto, and the persons entitled to access to the box.

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The value of the property involved should be clearly and precisely established; where a market value exists, such value should be shown in accordance with the broad rules of evidence generally; where no market value exists, the plaintiff should show the cost price less proper depreciation.

See **Bailment, Action Involving.**

SPECIAL VERDICT OR FINDING, OMISSIONS IN, EFFECT OF

It is essential that a special verdict contain a specific finding upon all the material facts or issues essential to support the judgment rendered; failure to observe this requirement may result in a setting aside of the judgment, upon the grounds that it is not supported by the findings. *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 3 L ed 220; *Sewall v. Glidden*, 1 Ala 52; *Chicago, etc. R. Co. v. Dunleavy*, 129 Ill 132, 22 NE 15; *Fireman's Fund Ins. Co. v. Dunn*, 22 Ind App 332, 53 NE 251; *Farmers Sav. Bank v. Forbes*, 151 Iowa 627, 132 NW 59; *Meighen v. Strong*, 6 Minn 177, 80 Am Dec 441; *Standard Sewing Mach. Co. v. Royal Ins. Co.* 201 Pa 645, 51 Atl 354; *Citizens Nat. Bank v. Texas Compress Co.* 294 SW 331 (Tex Civ App).

Thus, in an action for personal injuries, where contributory negligence was pleaded in the answer, and the jury failed to answer that issue in its verdict, it was held that the verdict did not warrant a judgment in favor of the plaintiff, and that a new trial would be granted. *Wilson v. Southern R. Co.* 165 NC 499, 81 SE 684.

The law will not create a presumption in favor of one upon whom the burden rests in a special verdict; it is essential that all material facts necessary to a recovery be found. *Fireman's Fund Ins. Co. v. Dunn*, 22 Ind App 332, 53 NE 251. As aptly stated:

"If, in a special verdict, the jury find only the evidence of a material fact, instead of the fact itself, or otherwise omit to find upon such a fact either way, no judgment can be rendered upon the finding for either party; since a matter of fact, essential to a determination of the cause, is left unascertained by the verdict." *Blake v. Davis*, 20 Ohio 231.

The facts not found, and which are necessary to support the judgment, will not be assumed to exist or inferred by the court from the evidence submitted, or other and related facts. *Kelchner v. Nanticoke*, 209 Pa 412, 58 Atl 851; *Hall v. Ratliff*, 93 Va 327, 24 SE 1011.

According to some authorities, the failure of a jury to find as to the existence of essential facts or issues is equivalent to a finding against the party having the burden of proving the same. *Meyer v. Green*, 21 Ind App 138, 69 Am St Rep 344, 51 NE 942; *Mulvaney v. Burroughs*, 152 Iowa 439, 132 NW 873; *Tobin v. Gantt*, 78 Okla 73, 189 Pac 170.

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STIPULATION OF FACTS, AVAILABILITY UPON SECOND TRIAL

The rule is well settled that a stipulation entered into between counsel for the purpose of evidencing agreement as to specific facts or matters at issue, is fully binding, and is available as proof of the facts admitted upon a retrial of the same case. The same rule applies in the instance of an admission made by counsel during the trial and formally made a part of the record, provided of course, that counsel does not in his admission or stipulation, limit the concession to a specific occasion or for a stated purpose. *Chapman v. York*, 212 Ala 540, 103 So 567; *Webster v. Goolsby*, 130 Ark 141, 197 SW 286; *Andrew v. Bankers & Shippers Ins. Co.* 125 Cal App 24, 13 Pac(2d) 515; *Moynahan v. Perkins*, 36 Colo 481, 85 Pac 1132; *Holley v. Young*, 68 Me 215, 28 Am Rep 40; *Fried v. N. Y. N. H. & H. R. Co.* 183 App Div 115, 170 NY Supp 697.

Accordingly, a stipulation by the parties as to the facts, so long as it stands, is conclusive between them, and cannot be contradicted by evidence tending to show the facts otherwise. *Chapman v. York*, 212 Ala 540, 103 So 567; see also *Le Barron v. Harvard*, 262 NW 26 (Neb), where the court held:

"Where a trial is had on a written statement of facts, not limited by its terms, and admitted to be true in open court, and the judgment rendered on that trial is reversed and the cause remanded, on a subsequent trial that statement is admissible in evidence."

A similar ruling has been made with respect to an agreed statement of facts, the court holding:

"The agreed statement of facts filed in the cause upon the previous submission was not a limited agreement, but was an unqualified admission of facts made for convenience and to expedite the trial. It has the appearance of having been intelligently and deliberately entered into, and was properly admitted upon this submission." *Le Barron v. Harvard*, 262 NW 26 (Neb).

It should be noted, however, that courts will on application properly made, relieve a party from the consequences of an admission or statement made by counsel. *McCarthy v. Benedict*, 90 Neb 386, 133 NW 410.

"There is no doubt that, when stipulations of fact in an action are improvidently made by mistake of the parties, the

court has discretion to relieve the parties from the consequences thereof. In such case the parties should act promptly and call the attention of the trial court to the mistake of fact in the stipulation, and, when that mistake is clearly found with a proper showing of diligence, the courts generally correct such mistake." *Ibid*.

Similarly, it should be observed that an admission or stipulation which is expressly, or by clear implication, limited to the pending proceeding, is not available on subsequent trials. *Currie v. Cleveland*, 108 Me 103, 79 Atl 19.

There are some decisions, however, expressive of the minority view upon this subject, which do not allow use upon a second trial of stipulations made on a former occasion. See cases collected in 100 ALR 784.

The right to withdraw a stipulation made, or an admission entered into the record, is a matter addressed to the sound discretion of the court, and involves the facts and circumstances of the particular case.

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STORE FRONT OR PLACE OF BUSINESS, IMITATING

Q—You are the plaintiff in this action?

Q—In what business are you engaged? A—In the grocery business.

Q—At what address do you maintain this business? A—422 Main Street.

Q—How long have you maintained this business at that address?

Q—I show you a photograph and ask if you recognize the store shown therein. A—Yes, it is the front of my store.

Q—Does this photograph accurately portray the front of your store as it exists at the present time? A—Yes.

(Offered in evidence.)

Q—I direct your attention to the large circle, with a star within it, appearing over the front of your store, and ask you what colors make up this sign.

(The proof should disclose in detail the characteristics of the advertising matter alleged to have been copied.)

Q—Can you tell us for approximately how long a period this sign has remained over the front of your store?

Q—Who erected this sign?

Q—During that period of time, did any other grocery store open up for business in the immediate vicinity of your business? A—Yes, the defendant opened his store at 426 Main Street.

Q—How far is that store from your place of business? A—Two doors away.

Q—When did the defendant open his store?

Q—I show you a photograph and ask if you recognize the store shown therein. A—Yes, it is the store at 426 Main Street.

Q—Is this a fair and accurate representation of the defendant's store as it appears at the present time? A—Yes, it is.

Q—I direct your attention to the sign over the front of the defendant's store; in what colors is this sign made, if you can recall?

(Each detail of similarity should be pointed out.)

Q—When did you first notice this sign?

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Q—What, if anything, did you do upon first noticing this sign?

(Examination of purchaser and patron of stores.)

Q—Where do you reside?

Q—How far is this from 422 Main Street?

Q—How long have you resided there? A—Two months.

Q—When you first moved there, did you have occasion to visit the grocery store at 422 Main Street? A—Yes.

Q—Do you recall what it was that first made you visit this store? A—A large advertisement in the daily newspaper under the name of Red Star Grocery Store.

Q—In what newspaper did you see this advertisement?

Q—Upon how many occasions did you notice it?

Q—Did you subsequently visit this same store? A—Yes.

Q—How frequently did you visit the store at 422 Main Street?

Q—Did you make purchases at this store upon these occasions?

Q—Did you, at any time during that period, visit the grocery store at 426 Main Street? A—Yes.

Q—Will you now tell this court and jury what it was that first made you visit this store, if you can recall? A—It was the advertisement of the Red Star Grocery Store, etc.

Q—Did you make that visit in the belief you were buying in the same store that had that advertisement?

Q—I show you a newspaper advertisement and ask if you recognize that as the advertisement you have just referred to?

Q—Did you ever receive any circular or handbill advertising the Red Star Grocery Store? A—Yes.

Q—I show you a paper and ask if this is one of the circulars you received?

There is no legal theory or rule which forbids a merchant from imitating the appearance of a store front, or vehicle, (or arrangement of either) belonging to a competitor. The general design and idea underlying the same are common property. But the use to which another puts an original layout or plan of a competitor, may determine the line between

lawful copying and unfair trade practice. It would seem that the line of demarcation in this respect is found in the element of public deception: does the imitator create an illusion that his store, or the products therein, belong to another, or are in some manner identified with the products or establishment of another enterprise? *Weinstock v. Marks*, 109 Cal 529, 42 Pac 142, 30 LRA 182; *Nokes v. Mueller*, 72 Ill App 431; *March v. Billings*, 7 Cush 322, 54 Am Dec 723; *Yellow Cab Co. v. Becker*, 145 Minn 152, 176 NW 345; Annotation: 17 ALR 784.

"No man of common sense, in my judgment, can stand across the street in front of these places of business without recognizing the similarity of the defendant's fronts to the complainant's front. Without careful study, and perhaps even after careful study, many persons, in my judgment, would consider that the defendant's shop was practically a department of the complainant's shop, or that both shops were one establishment. The whole corner, including the complainant's little shop and the defendant's similar shops on either side, is covered by practically the same broad, brilliant red band, and the defendant's shop has conspicuously in front, on the window, a shield of substantially the same design as the complainant's shield, covered in large letters with the word 'United,' over which, in comparatively small letters, appears the word 'Confectioners.'" *United Cigar Stores Co. v. United Confectioners*, 92 NJ Eq 449, 113 Atl 226.

Where it can be shown that a competitor has so arranged the front of his store, or so advertised its name and services, as to lead the public into the belief that it is dealing with the establishment of the complaining party, equity will enjoin the practice upon the theory of unfair competition. *United Cigar Stores Co. v. United Confectioners*, 92 NJ Eq 449, 113 Atl 226, 17 ALR 779.

In one case, the court pointed out that it was convinced "that defendants' stores have been dressed in such striking simulation and imitation of the appearance of complainant's store as to deceive a very large part . . . of the interested public who did not know otherwise, into thinking that defendant's stores were a part of or compartments in complainant's establishment. . . . Under these circumstances we think the likelihood of irreparable injury was sufficiently imminent to justify . . . a mandatory injunction before final hearing." *Ibid.*

The intent with which a store front is advertised or decorated may play an important part; such intent being determined from a consideration of all the surrounding facts and circumstances.

As has been stated:

"The defendant had the right to erect his building, and erect it in any style of architecture as fancy might dictate. He had the right to erect it in the particular locality where it was erected. He had the right there to conduct a business similar to that of plaintiff. He had a right to do all these things, for, of themselves, they did not offend against equity; but when they were done with a fraudulent intent, when they were done for the purpose of tolling away the customers of plaintiff by a deception, a fraud is practised and equity will do what it can to right the wrong." *Weinstock, L. & Co. v. Marks*, 109 Cal 529, 42 Pac 142, 30 LRA 182. See also: *Nokes v. Mueller*, 72 Ill App 431; *United Cigar Stores Co. v. United Confectioners*, 92 NJ Eq 449, 113 Atl 226.

The unfair trade practice may assume a wide variety of forms, depending upon the circumstances in each case. Thus, in one instance, it was held actionable to use the number placed upon another store, and which did not represent the actual number of the defendant's store. *Amos v. Coogan*, 52 NJ Eq 380, 28 Atl 788.

In another instance, the court enjoined a dairy company from using the name "Walnut Park Farm" upon the side of its trucks, with a distinctive design over the name, where it appeared that another dairy had for many years used the name "Walnut Grove Dairy," with a design similar to that used by the defendant. *Nokes v. Mueller*, 72 Ill App 431.

The right to protection against fraudulent imitation extends to vehicles used in the business, as well as store fronts. In one case it was pointed out:

"The appellee in this case, in the sixteen years he has been in business, has established a large and profitable trade, and carries it on under a given name, and should be protected from those attempting to usurp his business. The wrong in this case does not consist in appellant painting the running gear of his wagons yellow, or the body brown, or the top white, etc. The wrong is in their accumulation, not in any one of them alone; but all combined are sufficient to entitle appellee to an injunction. We hold the fact that appellant painted his

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wagons like appellee's and the pictures and inscriptions thereon were substantially similar, that they were liable to mislead customers. It seems from the evidence that some persons were thus mislead." *Nokes v. Muller*, 72 Ill App 431.

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SURGEON, UNAUTHORIZED OPERATION, ACTION FOR ASSAULT

(Action against surgeon for unauthorized removal of limb)

- Q—You are the plaintiff in this action?
- Q—Were you involved in an accident on the 10th day of August, 1942?
- Q—Describe the circumstances of this accident?
- Q—What injuries did you sustain? A—I had a fractured leg, severe cuts on the body, etc.
- Q—Where were you taken after the accident? A—To the Grant Memorial Hospital.
- Q—Did you see the defendant in this action at the hospital?
- Q—How soon after you arrived in the hospital did you see the defendant?
- Q—What conversations, if any, did you have with the defendant at the hospital?
- (Did such conversations cover possible amputation of the leg; was any mention made of infection; the need for operative procedure?)
- (Did the defendant have any conversations with the patient's family; what mention was made of the possibility that amputation might be necessary?)
- (Examination of expert witness.)
- Q—What is your occupation? A—Physician and surgeon.
- Q—Do you practice any specialty? A—Orthopedics.
- Q—How long have you practiced this specialty?
- Q—During that time have you had occasion to encounter the following type of fracture: (describe in detail)?
- Q—Approximately how many fractures of this type have you treated?
- Q—Did you, during the week of August 10th, 1942, have occasion to examine the plaintiff in this action?
- Q—Where was this examination held?
- Q—State the results of this examination.
- Q—Did you thereafter have occasion to again visit the plaintiff?
- Q—Did you find present any symptoms of the following condition: (describe the condition which the defendant asserts constitutes his justification for the amputation)?

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Q—What tests did you make to ascertain the presence of this condition?

(It is improper practice to ask the expert witness whether he personally would have amputated the limb in question, or performed the specific operation involved.)

(The proof should describe in detail the precise character of the injury or condition which led to the operation.)

(Hospital records, X-rays, and the testimony of qualified observers should be used to describe the pre-existing condition.)

A civil action for assault or trespass may be instituted against a physician or surgeon who performs an operation without securing the consent of the patient, where the latter is competent and able to confer the same; or of someone legally authorized to give such consent for the patient, unless immediate operation is essential to preserve the life of the patient, or to prevent a serious bodily consequence. See following cases:

Robinson v. Crotwell, 175 Ala 194, 57 So 23; Markart v. Zeimer, 67 Cal App 363, 227 Pac 683; Meek v. Loveland, 85 Colo 346, 276 Pac 30; Edwards v. Roberts, 12 Ga App 140, 76 SE 1054; Pratt v. Davis, 118 Ill App 161; Hershey v. Peake, 115 Kan 562, 223 Pac 1113; Van Meter v. Crews, 149 Ky 335, 148 SW 40; Theodore v. Ellis, 141 La 709, 75 So 655; Zoterell v. Repp, 187 Mich 319, 153 NW 692; Mohr v. Williams, 95 Minn 261, 1 LRA(NS) 439, 111 Am St Rep 462, 104 NW 12, 5 Ann Cas 303; Fausette v. Grim, 193 Mo App 585, 186 SW 1177; Mosslander v. Armstrong, 90 Neb 774, 134 NW 922; Schloendorff v. Society of New York Hospital, 211 NY 125, 52 LRA(NS) 505, 105 NE 92, Ann Cas 1915C 581; Francis v. Brooks, 24 Ohio App 136, 156 NE 609; Rolater v. Strain, 39 Okla 572, 50 LRA(NS) 880, 137 Pac 96; Hively v. Higgs, 120 Or 588, 53 ALR 1052, 253 Pac 363; Moss v. Rishworth, 222 SW 225 (affirming (Tex Civ App) 191 SW 843); Samuelson v. Taylor, 295 Pac 113 (Wash); Browning v. Hoffman, 90 W Va 568, 111 SE 492; Throne v. Wandell, 176 Wis 97, 186 NW 146. Annotation: 76 ALR 562.

It is difficult to propound a rule that will cover all situations that may arise in this connection; each case will spin its own pattern of liability, depending upon such factors as the seriousness of the emergency, the need for immediate surgery or other curative treatment, age and condition of the

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patient, accessibility of patient's parents or next of kin, the standing and repute of the surgeon, and whether there existed alternative methods of treatment. Thus, it is clear that the same operation may work differently in various situations.

In *Du Bois v. Decker*, 130 NY 325, 29 NE 313, 14 LRA 429, the court pointed out that "physicians in the nature of things are sought for and must act in emergencies, and, if a surgeon waits too long before undertaking a necessary amputation, he must be held to have known the consequences of such delay, and may be held liable for the resulting damage."

In *Luka v. Lowrie*, 171 Mich 122, 136 NW 1106, 41 LRA (NS) 290, the court stated:

"It would be unreasonable to hold a properly qualified physician or surgeon responsible for an honest error of judgment, where, as in the instant case, he is called upon to act in an emergency and must choose between two courses of action either one of which involves the possibility of the gravest hazard to the patient."

"In this complicated life which we are now living, surrounded on every hand by complicated machinery and rapid transportation of all sorts, with more or less serious accidents occurring very frequently, with persons, young, middle-aged, and old, carried in great numbers daily into offices and hospitals, more or less injured and mangled, the rules of conduct on the part of trained and educated expert surgeons must be fixed to reasonably fit the conditions. If the surgeon, confronted by an emergency, is not to be permitted, after having fairly and carefully examined the situation, to exercise his professional judgment in his honest endeavor to save human life, then the public at large must suffer." *Jackovich v. Yocom*, 237 NW 444 (Iowa).

It was said in *Cozine v. Moore*, 159 Iowa 472, 141 NW 424, 427: "All experts agree that every difficult case presents a zone wherein the best method becomes largely a question of judgment of the attending surgeon under all the apparent circumstances of such particular case."

The removal of tonsils has been held to constitute an assault and battery, for which an action may be maintained. *Hively v. Higgs*, 120 Or 588, 253 Pac 363, 53 ALR 1052.

Similarly, a pleading which set forth the unauthorized and unnecessary removal of an ovary, was held to state a good

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cause of action. *Edwards v. Roberts*, 12 Ga App 140, 76 SE 1054.

Liability was also extended to a dentist for extracting several teeth without the permission of the patient. *Throne v. Wandell*, 176 Wis 97, 186 NW 146.

It may be possible in some instances to imply consent from the fact that the surgeon had previously discussed the situation with relatives of the patient, as well as the patient. While this fact, standing alone, is not ordinarily sufficient to show consent, it is clear that in the vast majority of cases the surgeon does not solicit an express and formal consent and authorization to perform a specific operation; rather such consent is made out by the actions of the patient, and the surrounding circumstances. *Van Meter v. Crews*, 149 Ky 335, 148 SW 40.

Thus, it was pointed out in *Bakker v. Welsh*, 144 Mich 632, 108 NW 94, 7 LRA(NS) 612, that a father could not complain because his consent was not procured for an operation on his seventeen-year-old son for a tumor, where the operation was not of a very dangerous character and there was nothing to indicate to the doctors, before proceeding to operate, that the father did not approve of his son's going with his aunt and adult sisters to consult one of the doctors and following his advice.

The plaintiff's proof in cases of this character should be addressed primarily to the fact that the operation performed was not necessary to preserve life or avoid serious physical consequence, and was had without the consent or knowledge of the patient or those legally qualified to act for him. In most cases, expert testimony will be found helpful to establish the true character of the injuries, and to offset the defense that the operation was necessary under the circumstances of the case.

"Whether the defendant exercised the degree of care and skill required of his cannot be determined from the testimony of laymen or nonexperts, since it is only those learned in the profession who can say what should have been done, or that what was done ought not to have been done." *Delahunt v. Finton*, 244 Mich 226, 221 NW 168.

Evidence should also be prepared as to the prevailing practice of the medical profession in cases of the character in-

volved, and any explanatory circumstances indicative of the practice in the local community should also be introduced at the trial.

In *Nelson v. Sandell*, 202 Iowa 109, 209 NW 440, 441, 46 ALR 1447, the court said: "The physician is bound to bring to the service of his patient and apply to the case that degree of knowledge, skill, care, and attention ordinarily possessed and exercised by practitioners of the medical profession under like circumstances and in like localities."

A defense frequently interposed in cases of the nature under discussion is contained in the theory that when the patient first consulted the defendant, he reposed in the latter full authority to treat and prescribe according to the exercise of his best judgment, and that he impliedly (or expressly) authorized the surgeon to perform such acts upon the operating table as the circumstances then disclosed warranted.

Bennan v. Parsonnet, 83 NJL 20, 83 Atl 948, where the court held the defendant not liable, it appearing that the patient had a serious rupture of one groin, which had been unsuccessfully operated upon by another surgeon two years before, and the examination under the anesthetic disclosed that the other groin was in much worse condition.

Where the evidence discloses that a patient voluntarily submitted to a dangerous surgical operation, his consent will be presumed unless he is the victim of a false and fraudulent representation; and the burden of proof upon the question of consent is not, therefore, upon the surgeon performing the operation. *State use of Janney v. Housekeeper*, 70 Md 162, 2 LRA 587, 14 Am St Rep 340, 16 Atl 382.

In *Moss v. Rishworth*, 222 SW 225 (Tex), it was stated: "The evidence shows that there was an absolute necessity for a prompt operation, but not emergent in the sense that death would likely result immediately upon failure to perform it. In fact, it is not contended that any real danger would have resulted to the child had time been taken to consult the parent with reference to the operation. Therefore the operation was not justified upon the ground that an emergency existed."

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TENANCY, DAMAGE TO PROPERTY BY THIRD PERSON

- Q—You are the plaintiff in this action?
- Q—Where do you reside?
- Q—Were you residing at that address on January 30th, 1943?
- Q—Describe the nature of your tenancy at that time? A—I had leased the premises for a period of ten years.
- Q—Are you still a lessee of this property?
- Q—Describe the nature of the property. A—It is a one story brick building, etc.
- Q—At the time of renting this property what was the general condition of same?
- Q—Describe the use you made of this property.
- Q—What, if anything happened, to this property on January 30th, 1943?
(Describe the injury in detail, with particular reference to the extent of damage, effect upon use of property, etc.)
- Q—What repairs, if any, did you make upon the property?
- Q—Will you tell us to what extent, if any, you were prevented from making use of the property during the period of repairs?
- Q—For how long a period were you prevented from making use of the property?
(The proof should include all elements of loss.)
-

The courts generally hold that an action lies in favor of a tenant in possession of leased premises for injury to such premises, on the theory that his enjoyment of the leased property has been interrupted, and the value of his tenancy lessened for the unexpired term thereof. *Heilbron v. Kings River & F. Canal Co.* 76 Cal 11, 17 Pac 933; *Daniels v. Perkins Logging Co.* 9 Ga App 842, 72 SE 438; *Payne v. Moore*, 31 Ind App 360, 66 NE 483; *McPhillips v. Fitzgerald*, 177 NY 543, 69 NE 1126.

“The general rule of the common law is that, when real property is permanently injured, the tenant in possession, for life or a term of years, and the reversioner, each has a cause of action, to recover damages according to the extent of the injury to the estates of each.” *Anthony v. New York, etc. R. Co.* 162 Mass 60, 37 NE 780.

"One who is in exclusive possession of real estate as tenant under a lease is, during the continuance of his tenancy, to all intents and purposes the owner, and may maintain an action against a wrongdoer, which cannot be defeated by showing the title to be in someone other than the plaintiff. A tenant in possession is deemed the owner in law." *State v. Burns*, 123 Ind 427, 24 NE 154.

The recovery of the tenant may extend to such repairs as he was compelled to make to restore the property to its former condition, as in removing foreign objects therefrom, as well as the reasonable value of the use which he was deprived of. *Heilbron v. Kings River & F. Canal Co.* 76 Cal 11, 17 Pac 933; *Daniels v. Perkins Logging Co.* 9 Ga App 842, 72 SE 438; *State v. Burns*, 123 Ind 427, 24 NE 154; *Payne v. Moore*, 31 Ind App 360, 66 NE 483; *Anthony v. New York, etc. R. Co.* 162 Mass 60, 37 NE 780; *McPhillips v. Fitzgerald*, 177 NY 543, 69 NE 1126; *Bly v. Edison Electric Illuminating Co.* 172 NY 1, 64 NE 743; *Baumann v. New York*, 227 NY 25, 124 NE 121, 8 ALR 595. See cases collected in 8 ALR 605.

As has been stated: "A tenant may have an action for an injury to his possession. The same wrongful act which injures the freehold, and for which the reversioner may, under our statute, have an action, is often,—nay, in general,—an injury to the possession also, and for the latter the tenant has an action. . . . So far as by such acts the plaintiff was deprived of the use of his house, he was entitled to the value of such use during the interruption; and so far as he was put to expenses in removing stones thrown upon the house or lot, or in repairing damages thus occasioned, he was entitled to indemnity." Annotation: 8 ALR 610.

A distinction has been drawn between the right of the owner of the property to recover for injury to premises leased to another and the rights of the tenant. This distinction is well summarized in the following holdings:

"As between a landlord and his tenant, the latter, in the absence of some contractual provision to the contrary, has an exclusive right to the control and possession of the leased premises, and may defend such particular estate until the same has been legally terminated. The tenancy of plaintiff never having been terminated, he was lawfully in possession of the 3-acre plot of land, and entitled to the annual product of the soil in the nature of emblements, and for any injury inflict-

ed by a wrongdoer resulting in a diminution of his enjoyment of the premises he would be entitled to redress. On the other hand, if the injury is one of a permanent character to the reversion, such as destruction of standing timber, etc., the right to recover for such wrong is vested in the landlord. Where both landlord and tenant sustain damages by the wrongful act of a third person, the law recognizes the right of each, to maintain a separate action against the wrongdoer to redress his individual injury." *Baumann v. New York*, 227 NY 25, 124 NE 121, 8 ALR 595.

"A lessee may maintain an action for a nuisance to the real estate which he occupies, which is injurious to his possessory interest; while the landlord must bring the action for any injury to the reversion. If the nuisance of which the plaintiff complains made the enjoyment of the estate less beneficial, or in any way rendered it expensive or inconvenient, without fault on his part, he is entitled to compensation therefor." *Sherman v. Fall River Iron Works*, 2 Allen (Mass) 524, 79 Am Dec 799.

The distinction is further illustrated in the following holding:

"There is evidence from which the trial court has found that the plaintiff's right of occupancy has been impaired, and that her own personal effects have been injured to her substantial damage. This was not an injury for which the owner of the reversion could sue. If there was any right of action it belonged to the plaintiff. The injury to her right of occupancy was as separate and distinct from any injury to the reversion as the injury to her furniture and household belongings. During the term of the lease the premises belonged to the plaintiff, and the owner had no rights therein except such as were expressly reserved in the lease, or such as reverted to him after its expiration. If the act complained of is a nuisance, it is a wrong the existence of which cannot be justified at any time as against anyone injuriously affected thereby. If this is the rule, is it any less applicable in favor of tenants whose term begins during the continuance of the nuisance, than in favor of subsequent owners? . . . Logically, there can be no more reason for denying such a right of action to a tenant who 'comes to the nuisance' than there can be for withholding it from the tenant whose occupancy

precedes the nuisance. There can be no presumption that a wrong which may in fact be merely temporary will be permanent. Of course it may be permanent so long as no fault is found, but in a case like the one at bar, where the nuisance grows out of the method of operation rather than the character of the business or the structure in which it is carried on, the presumption, if any, is and should be that it is merely casual and temporary, and not permanent. If it is casual and temporary, then there is no reason why the landlord or owner should have a right of action for the injury, which is in fact suffered by his tenant, and by him alone." *Bly v. Edison Electric Illuminating Co.* 172 NY 1, 64 NE 745.

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TENANCY, IMPAIRMENT BY LANDLORD

Q—You are the plaintiff in this action?

Q—In what business are you engaged? A—In the scrap metal business.

Q—Where is your place of business located?

Q—How long have you had your place of business at that location?

Q—Describe the nature of your interest in this property?
A—I am a tenant under a lease.

Q—With whom did you make this lease?

Q—And for how long a period?

Q—Do you have a copy of this lease with you?

(After proper identification, the lease should be introduced in evidence.)

Q—Will you please describe to the court and jury the nature of the scrap metal business you are engaged in? A—I buy scrap and sell it to various steel companies, etc.

Q—During the course of that business, do any trucks bring scrap into your yards at that address?

Q—Do any trucks leave with scrap from that address?

Q—How far is it from your scrap yards to the street? A—Forty feet.

Q—How is the street reached from your yards? A—By going down a narrow passageway leading from the yards to the streets, etc.

Q—Is this passageway upon the property you leased? A—No.

Q—Is there any other way the street can be reached from your yards? A—No.

Q—Do you know, of your own knowledge, who owns the property upon which this passageway is located? A—The defendant in this action.

Q—The same person with whom you made the lease for your property? A—Yes.

Q—Now tell us, what if anything, happened to your use of this passageway? A—The defendant blocked it off by piling stacks of lumber on it, etc.

Q—When did this happen?

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Q—Did you advise the defendant of the nature of your business, and the method of operations, at the time you signed the lease?

(The lease should be carefully examined for any indications of knowledge on the part of the landlord of the intended use of the premises.)

Q—What, if anything, did you do upon learning of the blocking of the passageway?

Q—For how long a period did this condition exist?

Q—How much of the passageway did it block off?

Q—Was there any way for the trucks to leave or enter your yards, except by use of the passageway? A—No.

(The proof should make clear the extent to which the acts of the landlord interfered with the tenant's use of the premises, and the effects of such interference upon the enjoyment and use of the premises.)

(A continuance in possession by the tenant, under the adverse conditions, may constitute a waiver of certain rights, depending upon the facts of each case. See text.)

(In any action by a lessee for damages, the proof should clarify each item of damage resulting from the acts of the lessor.)

It is well settled that where a landlord undertakes a course of action calculated to materially interfere with a tenant's right to enjoyment of his tenancy, to such extent as to cause injury or damage to the tenant, short of actual eviction, the tenant may avail himself of several remedies, depending upon the facts in each case. Thus, where there resulted a situation which constitutes a constructive eviction, as by impairing the beneficial use of a portion of the premises, the tenant may vacate the property and claim a constructive eviction. The tenant may also, in such case, regard the acts of the landlord as constituting grounds for an independent action in tort or trespass, and claim damages for resultant injuries. See Annotation: 20 ALR 1369.

In order for a tenant to claim a constructive eviction in order to avoid payment of rent, he must actually abandon the premises; it is not sufficient that he intended to abandon the premises, or could find no other suitable place, or that it would be more expensive or prohibitively expensive to move. *Paterson v. Bridges*, 16 Ala App 54, 75 So 260; *Kistler v.*

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Wilson, 77 Ill App 149; Saunders v. Fox, 178 Ill App 37; Talbott v. English, 156 Ind 299, 59 NE 857; Beecher v. Duffield, 97 Mich 423, 56 NW 777; Thomson v. Ludlim, 74 NY Supp 843, 36 Misc 801.

Thus, it has been held that to "evict a tenant, according to the original signification of the word, is to deprive him of the possession of the land. But the landlord, without being guilty of actual physical disturbance of the tenant's possession, may yet do such acts as will justify or warrant the tenant in leaving the premises. The latter may abandon the premises in consequence of such acts, or he may continue to occupy them. If he abandons them, then the circumstances which justify such abandonment, taken in connection with the act of abandonment itself, will support a plea of eviction, as against an action for rent. If, however, the tenant makes no surrender of the possession, but continues to occupy the premises after the commission of the acts which would justify him in abandoning them, he will be deemed to have waived his right to abandon, and he cannot sustain a plea of eviction by showing that there were circumstances which would have justified him in leaving the premises. Hence, it has been held that there cannot be a constructive eviction without a surrender of possession. It would be unjust to permit the tenant to remain in possession, and then escape the payment of rent by pleading a state of facts which, though conferring a right to abandon, had been unaccompanied by the exercise of that right." Keating v. Springer, 146 Ill 481, 34 NE 805, 22 LRA 544.

The proof should be clear in establishing the condition complained of as due to the acts of the landlord, or someone under his control; where it appears that the condition complained of was due to acts of persons other than the landlord, and committed without his knowledge or consent, the tenant may not ordinarily claim an eviction. Goldberg v. Lloyd, 110 NY Supp 530.

The abandonment should be at the time the condition arose which it is claimed constituted grounds for claiming a constructive eviction. It is not sufficient that the tenant decided some time after creation of the condition to vacate the premises. Goldberg v. Lloyd, 110 NY Supp 530.

In accordance with this view, it has been stated in a case where the tenant abandoned the rented premises sometime

after creation of the condition at issue, as follows: "Assuming, without deciding, that the plaintiff was required to make such repairs, and to see to it that the front door was kept closed, his failure to do so need not be considered, in view of the uncontradicted evidence that the particular matter just mentioned had been remedied, or did not exist when the defendant vacated the premises. The defendant, by thus remaining upon the premises, waived whatever right he may have had, by reason of these matters, to claim a constructive eviction." *Ibid*.

It may also be noted in this connection that where the conditions complained of affect use of only part of the premises, and operate to deprive the tenant of the beneficial use of only such part, leaving the remainder of the premises free, he may retain possession of the latter portion of the property, and according to many authorities, not render himself liable for any part of the rental, upon the theory that eviction from a part of the premises suspends the entire rent. *Gray v. Linton*, 38 Colo 175, 88 Pac 749; *Morris v. Kettle*, 57 NJL 218, 30 Atl 879; *Lawrence v. Edwin A. Denham*, 109 NY Supp 752, 58 Misc 539; *Kuschinsky v. Flanigan*, 170 Mich 245, 136 NW 362; *Holden v. Tidwell*, 37 Okla 555, 133 Pac 54, 49 LRA (NS) 369; *Wade v. Herndl*, 127 Wis 544, 107 NW 4.

"Originally an eviction was understood to be a dispossession of the tenant by some act of his landlord, or the failure of his title. Of late years it has come to include any wrongful act of his landlord which may result in an interference with the tenant's possession in whole or in part. The act may be one of omission as well as one of commission. The rent is suspended by an eviction, because it is plainly unjust that the landlord should be permitted to collect it, while by his own act he deprives the tenant of the possession which is the consideration for it. But the landlord is not responsible for the actions of others lawfully done on their own premises. He is liable only for his own acts and for such acts of others as it was his duty to protect his tenant from." *Holmes v. Tidwell*, 37 Okla 553, 133 Pac 54, 49 LRA(NS) 369.

The rule is stated elsewhere as follows:

"A constructive eviction arises where a landlord, while not actually depriving the tenant of possession of any part of the premises leased, has done or suffered some act by which the

premises are rendered untenable, and has thereby caused a failure of consideration for the tenant's promise to pay rent. In the present case, however, there is no claim that the landlord's act in making or authorizing alterations has rendered the premises actually untenable. As a matter of fact, the tenant can still use the premises as a barber shop, and his only claim is that they have been rendered less convenient for that purpose. It is plain, therefore, that, if the landlord has interfered with the tenant's legal rights, the tenant must be permitted to urge the breach of the landlord's obligation, either as a defense or as a counterclaim to the landlord's claim for rent, or the tenant has no means of enforcing the landlord's obligation. The demise to the tenant undoubtedly included right of access to his premises, right to light and ventilation, and any act of the landlord which physically interfered with these rights of the tenant constitutes, in my opinion, an invasion of the demised premises and a partial eviction of the tenant therefrom. . . . If the demise includes a right to light and air, and the landlord physically interferes with such light and air, his act must logically constitute an eviction of the tenant from the beneficial enjoyment of part of the demise." *Schulte Realty Co. v. Pulvino*, 179 NY Supp 371.

The proof should, however, be clear and explicit in showing a condition which justified a tenant in abandoning part of the premises; a mere interruption in the tenant's use of the premises or part thereof is not sufficient to constitute an eviction. *Kelley v. Long*, 18 Cal App 159, 122 Pac 832.

In one case, the rule was summarized as follows:

"The fundamental distinction between a constructive eviction and an actual eviction should be borne in mind. When the landlord suffers acts to be done which make it necessary for the tenant to remove, or does or permits any intentional or injurious interference, either by himself or those acting under his authority, which deprives the tenant of the means or the power of beneficial enjoyment of the demised premises, or materially impairs such enjoyment, such acts are considered as tantamount to constructive eviction. But, in order to make a constructive eviction available as a defense, there must be an abandonment of the premises. . . . An actual eviction consists in the deprivation by the landlord of the tenant from the whole or some portion of the demised premises, and where there has been an actual eviction from a part of the demised

premises, the tenant may retain possession of what he has, the entire rent being suspended until full possession has been restored. The act of the landlord in depriving the tenant of a portion of the demised premises, being a wilful one, and done in defiance of the tenant and his rights under the lease, is in the nature of a trespass." *Seigel v. Neary*, 38 Misc 297, 77 NY Supp 854.

The theory behind the rule that a tenant who is evicted from beneficial use of part of the premises, may use the portion of the premises that he still retains control over, free from the obligation to pay rent for the entire premises, is well expressed in the following summary:

"There can be no doubt that in a case where an actual eviction appears—as where the lessor himself, or through someone authorized by him, actually enters upon the demised premises and appropriates a portion thereof to his own use, or deprives the tenant of the benefits of any portion thereof—there is a total suspension of the whole grant, even though but a portion of the premises is thus appropriated by the landlord, until the tenant is restored to the whole possession. This rule obtains in such cases notwithstanding the fact that the tenant may continue the occupancy of a portion of the leased property. Such eviction presents a tortious aspect involved in the wrongful trespass of the landlord. Because of this, the reason of the rule is said to be that, as the estate created by the lease is an entire one, for which one consideration is given, the landlord may not evict the tenant from a portion of the demised premises, and then be permitted to apportion his own wrong by insisting upon a part of the rent; for to hold otherwise, it is said would be to encourage landlords to evict their own tenants (whose possession they are rather bound to protect) when such eviction would inure to the pecuniary advantage of such landlords." *Dolph v. Barry*, 165 Mo App 659, 148 SW 196.

Notwithstanding a lessee remains in possession after creation of a condition by the landlord injurious to the beneficial use of the property, he may still use such breach of covenant by the lessor as set-off or counterclaim in an action for rent. *Smith v. Glover*, 135 Ark 531, 205 SW 891; *McAlester v. Landers*, 70 Cal 79, 11 Pac 505; *Keating v. Springer*, 146 Ill 481, 34 NE 805; *Thayer-Moore Brokerage Co. v. Campbell*,

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164 Mo App 8, 147 SW 545; *Ludlow v. McCarthy*, 5 App Div 517, 38 NY Supp 1075.

Thus, it has been stated in accordance with this view:

"The main question is as to the materiality of the evidence, and this involves the question of the right to set up, as a defense to the payment of rent, that the party was disturbed in his quiet and peaceable possession, was evicted from part of the premises, and injured, and the value of the rent so diminished. We are of opinion he has a right to show such facts in defense, upon this inquiry and assessment, in cases where the lease provided for his protection, expressed or implied. It is a legitimate inquiry, as well as payment under the general issue, as to the amount of rent due, and could be made and tried in the action of replevin and distress. For it was one of the peculiarities of a common-law distress that the tenant was forced to his replevin, in order to compel the landlord to prove his demand for rent, and enable the tenant to show payment, eviction, disturbance, or injury from the landlord's breach of the covenant in the lease." *Wade v. Halligan*, 16 Ill 507.

It was stated elsewhere, in commenting upon the right of the tenant to recoup damages for injuries suffered by a tenant due to acts of the landlord, as follows:

"We have no doubt that it may be done, as they grow out of the same transaction. The object of this inquiry is to ascertain the amount of rent due; and if the acts of the landlord impaired the value of the use of the premises, then the tenant should not pay the same rent as if the landlord had done no act to reduce such value. It is not like a demand growing out of or owing on some other account, which, by the repeated decisions of this court, cannot be set off or recouped in a proceeding of this character; but damages growing out of a breach of the terms of the lease by the landlord may." *Lynch v. Baldwin*, 69 Ill 210.

Care should be taken in the drawing of the pleadings, as for example, the avoiding of a plea of general denial where it is sought to recoup part of the damages sustained in an eviction, or offer the defense of partial or complete constructive eviction.

Manville v. Gay, 1 Wis 250, 60 Am Dec 379, where it was stated:

"We do not think that the testimony offered to prove the removal of the stairs tended to show an eviction of the

defendant from any portion of the premises demised, so as to entitle him to have the rent apportioned. But, if it was, it is doubtful whether the testimony was admissible under the plea. When a defendant has been prevented from occupying the demised premises, he is not obliged to pay any rent, because the consideration for the agreement to pay the rent has wholly failed. So, for the same reason, when the tenant has been evicted from the entire premises, he is not obliged to pay rent after the eviction. And, after an eviction from a portion of the premises demised, he would be liable only to pay rent for that portion which he continued to occupy; and it would seem, for the same reason, that the consideration for his agreement to pay the rent has in part failed. But a partial failure of consideration cannot be given in evidence under the general issue."

The tenant may institute an independent action against the landlord for damages sustained due to the latter's interference with his enjoyment of the demised premises. *Harden v. Conwell*, 205 Ala 191, 87 So 673; *Lacy v. Morton*, 76 Ark 603, 89 SW 842; *Agoure v. Lewis*, 15 Cal 71, 113 Pac 882; *Wood v. Monteleone*, 118 La 1005, 43 So 657; *Prochaska v. Fox*, 137 Mich 519, 100 NW 746; *Blaustein v. Pincus*, 47 Mont 202, 131 Pac 1064; *MacGlashan v. Marvin*, 185 App Div 157, 173 NY Supp 603.

"An action by a tenant against a landlord may be based upon contract, negligence, nuisance, or wilful injury. This case is of the latter class, and in such cases all the damages which are the direct and proximate consequences of the wilful act may be recovered. Damages to health and incidental expenses are no exceptions, provided a direct and proximate connection can be shown. In an action on a lease such damages, in the absence of an appropriate covenant, would be too remote, and not in the contemplation of the parties; but not so where the action is for a wilful wrong. The gist of the plaintiff's cause of action is that the defendant wilfully turned off the water in his tenement, which act made the plaintiff sick and caused him other damages. A landlord may not wilfully injure his tenant, any more than he may inflict such injury upon a third person." *Aguglie v. Bausch & L. Optical Co.* 172 NY Supp 666.

In another case, it was pointed out that where "premises are

leased for a hotel, and the landlord permits in the same building another business to be carried on that is well known by him to be hurtful to the business of a hotel, and has the same carried on contrary to the protests of his tenant, whether such business be the saloon business or any other business, in the absence of permission to carry on such business by the terms of the lease or otherwise, the landlord will be liable to the tenant for any damages so caused the tenant, by recoupment, when sued for rent." *Selz v. Stafford*, 284 Ill 610, 126 NE 462.

The law does not prescribe the exact character of acts that will constitute an eviction, or justify a tenant in regarding a situation as intolerable and sufficient to avoid further payment of rent. Generally, however, any material impairment of the beneficial use of the premises, is sufficient under this rule. Thus, any obstruction to the means of access is sufficient to constitute a breach of the covenant of quiet enjoyment. *Wait v. O'Neil*, 76 Fed 408, 34 LRA 550; *McDowell v. Hyman*, 117 Cal 67, 48 Pac 984; *Epstein v. Dunbar*, 221 Mass 579, 109 NE 730; *Pridgeon v. Excelsior Boat Club*, 66 Mich 326, 33 NW 502; *Hamilton v. Graybill*, 43 NY Supp 1079, 19 Misc 521; *Edmison v. Lowry*, 3 SD 77, 52 NW 583.

Thus, blocking off use of a door necessary in the course of a lessee's business, has been held sufficient to breach a covenant for quiet enjoyment of the premises.

Kitchen Bros. Hotel Co. v. Philbin, 2 Neb 340, 96 NW 487, where the court held:

"The 'covenant' for quiet enjoyment of the leased premises was implied from the demise. Hence, any interference with the effective use of the part of the building demised which would amount to an eviction in whole or in part, as a breach of such covenant, would be available to the lessee by way of counterclaim when sued on his covenant to pay rent. The use of the back door and hallway was clearly included in the lease. Considering the nature of defendant's business, which would make an office in the hotel building desirable because of its accessibility to travelers, patrons of the hotel, the fact that so large a part of defendant's business came from patrons of the hotel who entered his office from the hotel rotunda, and the fact that the room in question had been used for many years preceding as a ticket office, and had been reached from the rotunda by the hallway and door in question,

it is evident that the use of the back door by defendant's customers was in contemplation of the parties quite as much as the use of the front door, and that this door and hallway were reasonably necessary to the effective use of the part of the building demised. This being so, the obstruction thereof by the lessor, so as to prevent the use by the lessee and his customers, was an eviction, which the lessee might treat as total or partial at his election. The lessor could not insist that the lessee treat it as a total eviction; the latter might properly elect to remain and to sue for his damages upon the covenant for his quiet enjoyment."

A tenant that finds premises uninhabitable due to failure of sufficient heat may regard this condition as a breach of a covenant to heat the leased premises, and vacate the property, or institute a separate action for damages for breach of the covenant; he may also set up this condition as a counterclaim in an action for rent. *Globe Asso. v. Brega*, 190 Ill App 60; *Thomson v. Ludlum*, 74 NY Supp 875, 36 Misc 801; *Borchardt v. Parker*, 108 NY Supp 585; *Jacob New Realty Co. v. Noxall Shirt Co.* 171 NY Supp 376, 104 Misc 82.

The conduct of the tenant in remaining in premises after he discovered that same would not be heated, may constitute a waiver of any rights he may have under the theory of implied covenant to heat.

"The premises were rented for a purpose which required that the apartment should be artificially heated. Unless the temperature, therefore, was maintained so that the apartment could be occupied for the purpose for which it was rented, they were not the premises that were leased and which the tenant was bound to occupy. It would seem, therefore, that after the lease was signed, and before the tenant had taken possession, if he had discovered that the heating appliances were insufficient to keep the apartment in such a condition that it could be occupied by the family, that he would have been justified in refusing to occupy the premises, and could have defended an action under the covenant to pay rent on the ground that the landlord had never furnished him with such an apartment as was contemplated by the lease. And so, after the apartment had been occupied, but upon the arrival of cold weather, if it was found that the heating apparatus was incapable of keeping the apartment at a temperature sufficiently

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high to enable it to be occupied by his family as a living apartment, the tenant would have been justified in surrendering possession, and could have defended an action for the rent on that ground. Plaintiff, however, retained possession of the premises as a residence for his family, and, although constantly complaining of the temperature maintained by the defendant, he continued to occupy them. If there had been a covenant to furnish heat, which defendant had broken, the plaintiff could have maintained an action for any damages that he had sustained." *Jackson v. Paterno*, 112 NY Supp 924, 128 App Div 474.

A tenant has been held entitled to recover damages for impairment of her use of the leased premises where it appears that the landlord made an unwarranted use of the premises on the floor above, so as to create disturbances and other undesirable conditions.

McDowell v. Hyman, 117 Cal 67, 48 Pac 984, where the court held:

"The landlords, as the owners of the second floor, had an undoubted right to repair, alter, and improve that portion of their premises, but in so doing they were bound by their implied agreement to so conduct their operations as not to dispossess, or render uninhabitable the portion of the building they had demised to others, and if they failed in this duty they were liable to their tenants, irrespective of the question of negligence. As against third parties, they could take down the outer or inner walls of the building at will, subject only to such negligence and consequent injury as might render them liable to parties injured thereby; but as against their tenant, they could not do the same thing, even in a most careful manner, if the result destroyed the quiet enjoyment of such tenant."

"TOTAL DISABILITY," WHAT CONSTITUTES

The broad rule is generally stated that "total disability," within the purview of an accident policy, does not imply a state of absolute helplessness; it means an inability to perform all the substantial and material acts necessary to the prosecution of the insured's business, in the customary and usual manner. *Equitable Life Assurance Co. v. Wiggins*, 115 Fla 136, 155 So 327; *Travelers Ins. Co. v. Sanders*, 47 Ga App 327, 170 SE 387; *Medlinsky v. Metropolitan L. Ins. Co.* 146 Misc 855, 263 NY Supp 179.

Thus, it has been stated that: "it is not necessary that the plaintiff prove, beyond a reasonable doubt, that he is bed-ridden as a result of such injury or disease, or reduced to a condition of complete helplessness:" "he may be so disabled, within the meaning of the law, if he be so far incapacitated by such injury or disease, that he cannot, within the range of his normal ability, taking into consideration his education, training in work, and his physical condition, earn wages or profit in some occupation, and that he cannot engage in any gainful occupation or employment in the customary manner as a workman or employee." *Equitable L. Assur. Soc. v. Wiggins*, 115 Fla 136, 155 So 327.

It is pointed out that the fact that the person affected may perform some work, or transact some business duties, does not preclude the existence of total disability, provided of course, that the exercise of reasonable care and caution, as by compliance with doctor's orders, require total abstaining from work. *Blackman v. Travelers' Ins. Co.* 49 Ga App 137, 174 SE 384.

Furthermore, the fact that one can and does perform some of the duties pertaining to his or her occupation does not establish as a matter of law that there is not a "total disability" within the meaning of those words as used in an insurance policy. *Pacific Mut. L. Ins. Co. v. Dupins*, 188 Ark 450, 66 SW(2d) 284; *Republic L. & Acci. Ins. Co. v. Gambrell*, 248 Ky 63, 58 SW(2d) 219; *Caldwell v. Volunteer State L. Ins. Co.* 170 SC 294, 170 SE 349; *Illinois Banker's Life Assur. Co. v. Byrd* (Tex Civ App) 69 SW(2d) 517; *Atlantic L. Ins. Co. v. Worley*, 161 Va 951, 172 SE 168.

Similarly, the fact that the insured might be able to do some light and inconsequential work out of line with his usual and

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customary duties does not of itself preclude recovery as for total disability. *Prudential Ins. Co. v. Kelsay*, 257 Ky 633, 78 SW(2d) 923; *Austell v. Volunteer State L. Ins. Co.* 170 SC 439, 170 SE 776.

In one case it was pointed out:

“As it is a matter of common knowledge that men with diseases of the heart and other impairments which render activity liable to produce or accelerate death do nevertheless, with care, support themselves and lead useful lives for years, the threat of death does not alone show the disability described in this policy. The insured is not relieved from the effort at adaption made by others; the danger threatening must be imminent, or so close that anybody under that threat must be idle and deprived of power of earning in any way, physical or mental.” *Prudential Ins. Co. v. Brookman*, 175 Atl 838 (Md).

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TRADENAME OR TRADEMARK, INNOCENT INFRINGEMENT OF

- Q—You are the plaintiff in this action?
- Q—In what business are you engaged? A—The sale of handkerchiefs, linens and cotton goods.
- Q—By what tradename or trademark are your goods identified? A—By the name “Gold Medal.”
- Q—How long has such identification existed? A—Since Sept. 1st, 1941.
(Show proper registration and use of tradename and trademark.)
- Q—Did you, on or about April 15th, 1943, have occasion to notice a packaged handkerchief, other than your own, under the tradename “Gold Medal?” A—I did.
- Q—Will you please describe the circumstances under which you first saw this packaged handkerchief?
- Q—Do you recall the exact date?
- Q—What did you thereafter do, if anything, with respect to the similarity in names?
(Show in detail the nature and extent of use by the defendant after receipt of notice of infringement; did he thereafter continue advertising his product under the same name, or sell same to jobbers, wholesalers, retailers, etc.)

It is well settled that a person who innocently infringes the trademark or tradename of another is not liable for damages or an accounting of profits. *Pease v. Scott County Mill. Co.* 5 Fed(2d) 524; *Reading Stove Works v. Howes Co.* 201 Mass 437, 87 NE 751; *Liberty Oil Corp. v. Crowley, M. & Co.* 270 Mich 187, 258 NW 241, 96 ALR 645.

“Plaintiff’s claim for damages other than the loss of the profits on the oil sold by the defendant must be founded upon proof that the customers whom it has lost by reason of the sales made by the defendant will not return to it, and that the business it had established has been injured thereby. There is evidence that certain persons who had handled its oil quit doing so when informed that what they supposed to be the same oil was sold by the defendant at a price less than it sold it. But a careful examination of the record discloses that plaintiff’s loss of business in this respect occurred prior to

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the notice of infringement given to defendant, and, as already stated, no liability attached to the defendant therefor. When the manner in which plaintiff conducted its business and the few customers it at any time had in the city of Detroit and its vicinity are considered, it would, in our opinions, be inequitable to award it damages on account of the sales made by defendant after the notice was given, which were made only to persons on request therefor." *Liberty Oil Corp. v. Crowley, M. & Co.* 270 Mich 187, 258 NW 241, 96 ALR 645.

"The weight of modern authority is in favor of the rule that an account of profits will not be taken where the wrongful use of a trade-mark or a trade-name has been merely accidental or without any actual wrongful intent to defraud a plaintiff or to deceive the public." *Regis v. Jaynes*, 191 Mass 245, 77 NE 774.

In one case the good faith of the infringer was held established by proof that he purchased the goods from a third party, and used such goods without knowledge of its resemblance to another product, and that upon learning of such resemblance, he immediately ceased selling or using such goods. *Peerless Rubber Mfg. Co. v. Nichol*, 187 Fed 238.

"While one using a registered design similar to that adopted earlier by another may be enjoined from further use thereof, he may not be charged with profits if it appear that the original imitation was unintentional, that no deceit or substitution of goods was accomplished in fact, and that no considerable part of the business was due to his goods being supposed to be those of the earlier user of the design." *Straus v. Notaseme Hosiery Co.* 240 US 179, 36 S Ct 288.

It should be further noticed that after the infringer receives notice and warning by the owner of the trademark of the extent of infringement, that such infringement cannot be called innocent if indulged in thereafter, so as to justify a denial of an accounting for profits. *Lawrence-Williams Co. v. Societe Enfants Gombault*, 285 US 549, 76 L ed 940.

It has also been upheld that the advise of counsel does not necessarily make the infringement of a trademark or trade name innocent, so as to protect the infringer from an accounting for profits. *Lawrence-Williams Co. v. Societe Enfants Gombault*, 285 US 549, 76 L ed 940.

**UNFAIR COMPETITION, LITERARY OR
ARTISTIC CREATIONS**

- Q—You are the plaintiff in this action?
- Q—In what business or profession are you engaged? A—I publish a private business advisory letter.
- Q—By what name is your publication known? A—The Standard Business Advisory Letter.
- Q—How long have you been engaged in this work?
- Q—And for how long a period has your publication been known by that name?
- Q—Do you copyright each issue of your publication?
- Q—I show you a series of papers, and ask if you can identify them? A—They are all copies of my business letter.
- Q—Are they copies of letters already in circulation? A—Yes.
(Offered in evidence.)
- Q—I now show you a series of envelopes, and ask if you can identify them? A—They are the envelopes used for mailing the letters.
- Q—Do all your business advisory envelopes contain the same insignia as these envelopes?
(Offered in evidence.)
(The proof should show in detail the nature and extent of circulation of the plaintiff's and defendant's work; copies of the defendant's work should be introduced in evidence, and all points of similarity fully developed.)
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A literary or artistic creation is, like any other product of effort and ingenuity, entitled to full protection against unfair competition, apart from any rights which may exist under the copyright laws, or under common-law rules affecting plagiarism. *Lare v. Harper & Bros.* 86 Fed 481, 57 US App 279; *Montgomery Enterprises v. Empire Theatre*, 204 Ala 566, 86 So 880; *Kortlander v. Bradford*, 116 Misc 664, 190 NY Supp 311.

The law does not prescribe the form of the literary or artistic creation; it may assume any one or more of the more common forms of artistic reproduction, such as motion pictures, novels, paintings, or statutes; where the work is shown to have originated with the plaintiff, and to possess certain

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definite characteristics which associate same with the originator in the public mind, the law will prevent unfair competition by enjoining use in another of such matter. *Merriam v. Famous Show & Clothing Co.* 47 Fed 411; *Lare v. Harper & Bros.* 86 Fed 481, 57 US App 279; *Montgomery Enterprises v. Empire Theatre*, 204 Ala 566, 86 So 880; *Kortlander v. Bradford*, 116 Misc 664, 190 NY Supp 311.

Thus, in the instance of books, it is stated:

"The rules stated as to competition in business apply to the publication of books under a particular name. Such a name is the subject of property, and a colorable imitation of the name adopted by one publisher, by another engaged in publishing similar books by which the public may be easily misled into supposing that it was the literary article they desired to obtain, is an act of deception which injures the publisher who first adopted the name, and which he may call upon a court of equity to redress." *Fisher v. Star Co.* 231 NY 414, 132 NE 133.

In commenting upon the nature of the property right in the well known cartoon characters of "Mutt" and "Jeff," one court pointed out as follows: "It appears from the findings of fact that the grotesque figures in respondent's cartoons, as well as the names "Mutt" and "Jeff" applied to them, have, in consequence of the way in which they have been exploited by the respondent and the appearance and assumed characters of the imaginary figures have been maintained, acquired a meaning apart from their primary meaning which is known as a secondary meaning. The secondary meaning that is applicable to the figures and the names is that respondent originated them, and that his genius pervades all that they appear to do or say.

"It also appears from the findings of fact that the respondent is the owner of the property right existing in the characters represented in such figures and names. They are of his creation. They were published and became well known as distinct characters."

The right to protection under the theory of unfair competition does not depend upon the existence of a copyright in the subject matter; the originator of the work of art may invoke the equitable remedies applicable to protection under unfair competition, notwithstanding his work has been in general

circulation and is uncopyrighted. *E. P. Dutton & Co. v. Cupples*, 102 NY Supp 309, 117 App Div 172.

Nor is it essential for the plaintiff to prove a fraudulent intent in the defendant. *E. P. Dutton & Co. v. Cupples*, 102 NY Supp 309, 117 App Div 172.

In the instance of unfair use of uncopyrighted booklets containing religious hymns, illustrated and distinctively colored, it was held as follows: "The plaintiff cannot and does not question defendants' right to publish any one, or all, of the same hymns and poems; to publish them in half-white binding, with decorated and pictured binding; to adopt any form of type it pleases; to illustrate the books, and to decorate the borders of its pages; but it is contended, and, as we think, with reason, that it is violative of the rule of fair trading and fair competition, as established and enforced by law, to prohibit and offer for sale such identical copies (save in artistic merit and workmanship) of the books which plaintiff had published, and for which it had created a profitable demand. The obvious purpose of publishing such copies was to trade upon the favorable reputation which plaintiff had established for its books, to deceive many purchasers into the belief that they were purchasing plaintiff's books, and to damage plaintiff by the unfair use of its ingenuity in devising the general make-up of its books, and of its success in placing the books upon the market. In such a case it was unnecessary for plaintiff to prove, *dehors* the books themselves, that defendants were inspired by a fraudulent intent." *Ibid*.

It should be carefully noted that the right to protection under the theory of unfair competition does not extend to enjoining republication of previously published uncopyrighted matter, provided such republication avoids any misrepresentation as to the real author. *Clemens v. Belford*, 14 Fed 728.

Thus, it has been held that an author cannot "by the adoption of a *nom de plume*, be allowed to defeat the well-settled rules of the common law in force in this country that the 'publication of a literary work without copyright is a dedication to the public, after which anyone may republish it.' No pseudonym, however ingenious, novel, or quaint, can give an author any more rights than he would have under his own name. The policy of the law in this country has been settled too long to be now considered doubtful, that the publication of literary

matter without protection by copyright has dedicated such matter to the public, and the public are entitled to use it in such form as they may thereafter choose, and to quote, compile, or publish it as the writing of its author. That is, any person who chooses to do so can republish any uncopyrighted literary production, and give the name of the author, either upon the title page, or otherwise, as best suits the interest or taste of the person so republishing." *Clemens v. Belford*, 14 Fed 728.

Courts are not entirely agreed as to the extent of protection properly afforded under the theory of unfair competition. There has been a natural reluctance on the part of some courts to perpetuate in one person the right to use a common character or a specific media for the expression of an idea, upon the theory that such protection would in effect give a monopoly in abstract ideas, a result which the law has consistently endeavoured to avoid. *Social Register Asso. v. Murphy*, 128 Fed 116.

Thus, in refusing to enjoin use of a series of books bearing the common words "Society," and "Social," it was stated:

"The words 'Society' and 'Social' are not arbitrary signs. They are descriptive, and have a commonly understood meaning in the terms 'society events,' 'social gossip,' etc. It is legitimate to compile a bluebook, or society list, for a city in which the complainant has no publication; and the word 'social' is one that persons might naturally employ in connection with other words in making up a title to a local book. While the use of the word 'social,' like the use of a proper name, might, under particular circumstances, constitute unfair competition, yet such circumstances have not been shown to exist in this case. An inspection of the defendant's book, its size, shape, type, color of binding, etc., precludes the belief that a person familiar with the publications of the complainant would be led by the defendant's title or by the general appearance of the book, to believe that it was one of the complainant's publications. The feature of family groups in brackets can hardly be regarded as a deceptive similarity. The whole impression, on a comparison of the complainant's and defendant's publications, is rather of substantial difference than of substantial resemblance." *Social Register Asso. v. Murphy*, 128 Fed 116.

Elsewhere, it has been pointed out, in distinguishing between a moving picture and a book, as follows:

"We do not think a moving picture show is of the same class as a written book. One belongs to the field of literature; the other to the domain of theatricals. Originally, there was no legal connection between the written novel and the dramatization based upon its characters and incidents. The connection was made by statute in derogation of the common law. In the absence of copyright, the situation is as if no such connection had ever been made. We are unwilling indirectly to extend to writings a protection beyond that conferred by statute. Congress created a specific form of monopoly for literary property in this country, and made it subject to express limitations. It is for Congress to say whether these limitations should be relaxed. Neither trademark nor tradename can afford protection to detective stories as such, whether public or still unborn, and much less where neither title nor composition is pirated, and but a single common character is used. The suggestion involves an attempt to make a monopoly of ideas, instead of confining the application of the law to 'a particular cognate and well known form of production.'" *Atlas Mfg. Co. v. Street*, 204 Fed 398, 58 L ed 262.

In one case, not entirely in point, since the suit was based entirely on infringement of a trademark, it was held:

"The contention of complainant is that it is unfair competition in trade for anyone else to draw and offer for sale any other pictures in which, although the scenes and incidents are different, some of the characters are imitations of those which appear in the earlier pictures which the complainant sold to the defendant. In other words, that deponent, although he never copyrighted them, and did not acquire any right to the title in connection with newspaper publications, has nevertheless some common-law title to individual figures therein displayed, which he can maintain to the exclusion of others who depict them in other scenes and situations. It is sufficient to say that no authority is cited supporting this proposition, which seems entirely novel, and does not commend itself as sound." *Outcalt v. New York Herald*, 146 Fed 205.

WRIT OF PROHIBITION, ISSUANCE OF

A writ of prohibition is ordinarily defined as a directive to a judicial or quasi-judicial tribunal enjoining it from exercising jurisdiction over specific matters, as not within its proper sphere.

Thus, a writ of prohibition may be directed to a specific judge and prosecutor ordering them to cease from the prosecution of a cause, on the ground that improper jurisdiction has been assumed. *Ferguson v. Martineau*, 115 Ark 317, 171 SW 472, Ann Cas 1916E 421; *Bullard v. Thorpe*, 66 Vt 599, 30 Atl 36, 25 LRA 605.

The remedy of writ of prohibition is not used to any great extent, and courts have exercised extreme caution in issuance of such writs, requiring a clear showing of the facts justifying this remedy. The precise grounds for use of such writ are not capable of classification, as each case will set its own pattern in that respect. It has been held, however, that the delay and expense of an appeal will not constitute sufficient grounds for inducing another court to predetermine the issue of jurisdiction. Such ground may, however, in a proper case constitute one of the inducing causes for issuance of the writ. See cases collected in 42 Am Jur § 7, p 143; *Evans v. Willis*, 22 Okla 310, 97 Pac 1047; *Eberhardt v. Barker*, 104 Fla 535, 140 So 633.

Where a writ of prohibition is issued, it must be obeyed by any court of inferior jurisdiction to that issuing the writ. *State ex rel. Merriam v. Ross*, 122 Mo 435, 25 SW 947.

The proper procedure in issuance of writs of prohibition is largely dependent upon the rules and statutes applicable to the particular jurisdiction. But it is generally required that the moving papers be explicit in showing the failure of jurisdiction in the court sought to be divested thereof. In some jurisdictions, it must be shown that the plea of lack of jurisdiction must first be made to the inferior court, and that such plea was rejected, before a superior court will assume determination of the issue. But it has also been stated in this connection that public interest and convenience may impel a higher court to act promptly without first requiring an adverse decision by the inferior court. *Havemeyer v. Superior Ct.* 84 Cal 327, 24 Pac 131; Annotation: 35 ALR 1093; *State ex rel. McCaffery v. Aloe*, 152 Mo 466, 54 SW 494, 47 LRA 393.

Local statutes generally prescribe who may apply for a writ of prohibition. In the case of an application to the Supreme Court of the United States, the petition may not be made by a stranger to the record who has only a general interest in the subject matter of the controversy.

The moving papers should make clear that the inferior court has actually assumed jurisdiction, or has committed an act which makes clear its determination to proceed with the case. A mere suspicion that an improper exercise of jurisdiction is to take place is not sufficient to impel issuance of a writ of prohibition. *Re Leaf Tobacco Board of Trade*, 222 US 578, 56 L ed 323; *Stone v. Kuteman*, 150 SW(2d) 107 (Tex Civ App).

PART II

PROOF OF SPECIFIC MATTERS

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ty, from a place outside the state, a short time before the trial, is competent evidence of absence from the jurisdiction. *Hardaman v. State*, 17 Ala App 49, 81 So 449.

It has also been held that proof of absence may be established by proof of entries in official journals or records, made by a person in the course of his regular duties, such entries having been made under circumstances which make impossible the presence of the person at the site of the trial at the time of the making of the entries. *Clark v. Society of St. James*, 21 Hun(NY) 95.

Absence may also be shown by testimony that a witness called at the place of residence of the person involved and was informed of his departure for points beyond the state. *People v. Rowland*, 5 Barb(NY) 449. Continued nonresidence may also be shown as proof of absence at a specified time, upon the theory of presumption of continuance of a stated condition. *Rixford v. Miller*, 49 Vt 319.

The statements of a person, relative to his intent to leave the state, or showing a combination of circumstances inferring the intent to leave the jurisdiction, may also be shown as some proof of absence at a particular time. *People v. Ramos*, 52 Cal App 491, 199 Pac 544.

The mere unsupported conclusion of a witness that a person is out of the state, is not regarded as competent upon the question of absence. It is essential to lay a credible basis for the opinion of the witness, taking it outside the realm of mere conjecture. *Baldwin v. Walker*, 94 Ala 514, 10 So 391.

Answers given to a person making a search for another are not regarded as hearsay, but may be admitted as part of the *res gestae*, to show the fact of absence. *Cohoes Bronze Co. v. Georgia Home Ins. Co.* 243 App Div 224, 276 NY Supp 619.

ACCEPTANCE, PROOF OF

The fact of acceptance of a particular act, writing, or offer, may be proven by acts or statements of the defendant, or party involved, which expressly or impliedly indicate an intent to consummate such acceptance. The exact nature of the proof admissible in this respect obviously depends upon the facts and circumstances of each case.

Where a person has received certain goods, or articles of personal property, and uses same, failing to notify the sender of any defects or imperfections, an acceptance is generally established, subject to explanation or rebuttal. *Wineland v. Jones*, 77 Iowa 401, 42 NW 333.

Acceptance of a street, road or other public agency, may be established on the part of the municipality or township by proof of any acts tending to show an intention to accept and manage same on behalf of the public. Thus, an acceptance is made out by the act of grading, working or repairing a road, or by any other conduct showing an intention to care for the street. *Grube v. Nichols*, 36 Ill 92; *Pomfrey v. Saratoga Springs*, 104 NY 459, 11 NE 43.

Acceptance of a legal document, as a deed, will, or similar instrument may be established by proof of the actual tender and formal retention of same, unless there are circumstances present which impel a contrary conclusion. Thus, ignorance on the part of the person allegedly accepting the document of the nature of the contents of the writing, will prevent any inference of acceptance. *Moore v. Flynn*, 135 Ill 74, 25 NW 844.

A party who receives a bill of exchange will be presumed to have legally accepted the same where he retains same for a great length of time, or by any other overt act indicates an intent to accept same. *Julian Petroleum Corp. v. Egger*, (Mo) 15 SW(2d) 36.

Acceptance of a deed to property will be inferred from the taking of possession of the property conveyed in such instrument, and the use thereof by the grantee of the deed. *Saunders v. Bolden*, 155 La 136, 98 So 867.

The burden of proof to establish acceptance is ordinarily upon the party asserting same; upon his sustaining such burden by showing facts sufficient to create such presumption, the burden shifts to the party alleged to have accepted to rebut the inference created. *Galt v. Herndon*, 16 La App 239, 133 So 800.

Where a party executes a written acceptance of goods or other property, such acceptance may not be varied by oral proof showing that such acceptance never took place, or that the retention was conditional in character. *Haines v. Nance*, 52 Ill App 406.

There are some situations, however, where oral proof is admissible to show that the written acceptance never actually consummated an acceptance in law, as where fraud, mistake, or undue influence is present in the execution of the acceptance in writing. *Scott v. Rolkin*, 133 Cal App 209, 23 P(2d) 1065.

The existence of a collateral oral agreement may also be shown to modify the written acceptance, or to show that it had no legal inception due to the failure of certain conditions to arise. *Vincent v. Russel*, 101 Ore 672, 201 Pac 433, 20 ALR 417.

In seeking to establish that an agent or employee of the defendant actually accepted certain goods or merchandise forming the subject of the suit, it is improper to ask the witness whether he "accepted" the property on behalf of his employer. Such question calls for a conclusion, and is hence improper. The questioning should be confined to the circumstances surrounding receipt or delivery of the property. *Brewer v. Housatonic R. Co.* 107 Mass 277.

Admissions of a party may be shown as some proof of an intent to accept property, or documents. *Bruner v. Nisbett*, 31 Ill App 517.

Similarly, statements of a party made at the time it is alleged he received certain property may be admitted as part of the *res gestae*, as for example, statements to the person delivering the goods as to his intent to retain the same or otherwise dispose of the property. *Stevens v. Miles*, 142 Mass 571, 8 NE 426.

It is also competent to show acts of a party relative to the goods involved, which imply an acceptance, as for example, the making of repairs or improvements, or the removal of the property from one place to another for the purpose of making better use of same.

The acceptance of services rendered by another may be established by proof that the defendant knowingly permitted the services to be given, and failed to express any objection to same, while receiving the benefits thereof. *Mitcham v. Singleton*, 50 Ga App 457, 178 SE 465.

ACCIDENT REPORT, PROOF OF

Accident reports which contain admissions or statements against interest of the person making the report, or the person on whose behalf the report is made, are ordinarily admissible in evidence, notwithstanding they contain matters of a purely opinion or hearsay character. *Swain v. Oregon Motor Stages*, 82 Pac(2d) 1084 (Ore).

Accident reports are also admissible to refresh the recollection of a witness as to the events therein described.

A report filed by the owner or operator of a car with the motor vehicle bureau of his state, pursuant to a statute making such report compulsory, is generally held inadmissible in favor of such owner or operator, it being in the nature of a self-serving declaration. *Voegeli v. Waterbury Yellow Cab Co.* 111 Conn 407, 150 Atl 303.

A distinction is drawn in some cases between the report of an accident filed by a private citizen, pursuant to a statutory requirement, and the report of a public official in the performance of his duty. "Reliance can be safely placed upon the action of the public official acting under the sanction of his office, which is not true in the case of a report made by a private citizen." *Ezzio v. Geremiah*, 107 Conn 670, 142 Atl 461.

It was sought in one case to introduce in evidence the report of a motor vehicle operator, for the purpose of showing that he acted as the agent of another in the operation of the automobile. The court held such practice improper, it appearing that no other evidence was introduced to establish the fact of the agency. *Voegeli v. Waterbury Yellow Cab Co.* 111 Conn 407, 150 Atl 303, holding:

"The report was offered and received in evidence in proof of the very fact of the agency, the existence of which fact must first be shown in order to make the report admissible against the defendant. It is elementary that agency cannot be proved by the statements of the agent."

The fact that the report is made by an agent of the defendant, or an employee, will not vary the rule denying admissibility of the writing. *Carroll v. East Tennessee V. & G. R. Co.* 82 Ga 452, 10 SE 163.

Thus, in the case last cited, it was held that the report to the general manager of the railroad, reciting the facts and circumstances of an accident, was not admissible in evidence

against the defendant, regardless of the fact that the report was explicit in its description and conclusion of liability for the accident.

Similarly, the report of a station agent to the railroad that a fire was caused by sparks from a locomotive was held inadmissible against the railroad in an action based upon losses sustained by the fire. *Warner v. Maine C. R. Co.* 111 Me 149, 88 Atl 403.

It was also held that the timecard of a streetcar conductor is inadmissible to show the time when an accident took place. Annotation: 125 Am St Rep 856.

But as a practical matter, it is a common practice for counsel to secure full use of a damaging statement by an employee of the defendant, where such employee participated in the events leading up to the accident, by the simple expedient of making such employee a co-defendant. In so doing, any act of the employee becomes an act against his own interests, and his accident report, and admissions concerning liability, are admissible against himself. It is true that such report will be specifically excluded by the court in its charge from application against the employer, but the effect of the admission is nevertheless secured.

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ADMISSIONS, GENERALLY

Definition

An admission is generally defined as a statement made orally or in writing and which serves to directly or inferentially operate against the interests of the person making such statement, provided that the utterance is relevant to a matter or fact at issue. Such statement is admissible notwithstanding it was made without the sanction of an oath.

The fact that the person uttering the admission bases the statement upon hearsay information, and makes the same as an opinion, without certainty of belief, may operate to exclude same from use at the trial as an admission. It is not necessary that the statements be made to the adverse party to the action, they may be made to anyone. (See *Rudd v. Byrnes*, 156 Cal 636, 105 Pac 957; *Buck v. Brady*, 110 Md 568, 73 Atl 277; *Martin v. Sandord*, 129 Neb 212, 261 NW 136; *Peters v. Nolan Coal Co.* 61 W Va 392, 56 SE 735.)

Subject Matter of Statement

No precise limitations are placed upon the content of an admission; it may relate to any fact or matter, provided only that the subject matter is relevant to the matter at issue.

An admission may be used to prove such a wide variety of matters as financial condition, delivery of a deed, ownership, liability for an accident, transfer of a chose in action, or participation in a joint venture. (See 20 Am Jur p. 488.) A frequent use of admission is to define the character and extent of ownership of property, real or personal, and courts have admitted a wide range of admissions upon this point. Thus, courts have allowed admissions to show that a person claiming title at a specific time to personal property did not actually possess such title. Similarly, admissions have been used to show the nature of a possession of real property, and to clarify a claim of ownership. (*Tarver v. Deppen*, 132 Ga 798, 65 SE 177, 24 LRA(NS) 1161.)

Admissions have also been used to show the character of a boundary line in dispute. Such statements are also admissible to show notice or knowledge upon pertinent facts in issue. Thus, an agent's statements may be used to show that he was authorized to act for the principal at a specific time and for a stated purpose. (80 ALR 932.)

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Person Making the Statement

It is essential that the statement be made by the party against whom it is sought to be used. A statement made by a third person cannot obviously be used against another, unless it is made to appear that the party expressly consented to be bound by the statement made.

Where a joint interest exists, and this joint interest is involved in the trial or proceeding, a statement made by one of the joint owners may be used against the other. (*Greenbaum v. Stern*, 90 Wash 156, 155 Pac 751.) Thus, the declarations of one of several joint covenantors, upon a matter directly relating to the covenant, may be used as an admission against another joint covenantor.

Similarly, where the defendants in an action are jointly liable under a contract, an admission by one may be used against the other, providing its relevancy to the issue is shown. (*Forsyth v. Doolittle*, 120 US 73, 20 L ed 586.)

Condition of Declarant

A statement in the nature of an admission is inadmissible where it appears that the declarant was in such physical or mental condition that he did not understand fully the nature of his statement. Where the proof is not clear on this point, and the inference as to the condition of the declarant is debatable, the court should charge the jury that any determination they make as to the condition of the person making the statement may go to affect the weight of the statement made. (*McCord v. Electric Co.* 46 Wash 145, 89 Pac 491.)

Form of Statement

The law does not prescribe any particular form for a statement sought to be admitted in evidence as an admission. It is essential, however, that the statement have been expressed in definite and clear language, as distinguished from an uncertain, equivocal statement.

The declaration may be oral or in writing. Thus, an admission may be gleaned from an entry in a book of account as readily as from a letter. (*Harrison v. Remington Paper Co.* 140 F 385, 5 Ann Cas 314.)

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Proof of Statement

The admission may be proved by any witness who is competent to testify thereto. His opinion as to the nature and precise form of the statement may be given to the best of his recollection, in as nearly exact a form as is possible in view of the surrounding facts and circumstances.

Absolute certainty with respect to the form and content of the statement is not essential. (*Dennis v. Chapman*, 19 Ala 29, 54 Am Dec 186.) The only prerequisite to the admissibility of the statement is that it be relevant to the issues presented, and that the witness describing same be competent to testify. It is not necessary that the declarant have been warned of the possible use of his statement, or his attention directed thereto or any other foundation laid for use of the statement as an admission, except as the basic requirements here outlined have been met. (*Coffin v. Bradbury*, 3 Idaho 770, 35 P 715; *Churchill v. White*, 58 Neb 22, 78 NW 369.)

Time of Statement

There is no definite time limitation as to when the statement must have been made to become admissible as an admission. Each statement must depend upon the facts and circumstances of the particular case. Where a statement has been made a long time before the fact to which it relates, it may weigh less than a more recent statement.

Thus, it has been held that statements made several years before the occurrence, and under circumstances which do not imply a full realization of the event, may not be used as admissions. (See 20 Am Jur p. 467.) The true test in this connection is whether the statement was made at such a time, and under such circumstances, as to impel belief in the truth thereof.

Use of Entire Statement

The broad rule prevails that a statement which contains an admission sought to be admitted in evidence becomes admissible in its entirety. Thus, it has been held that where correspondence contains an admission sought to be proved, the portions of the correspondence which contain explanatory statements, or which relate to, or clarify, the admission, are also admissible, provided only that they are otherwise com-

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petent and relevant to the issues presented. *Illinois C. R. Co. v. Manion*, 113 Ky 7, 67 SW 40.

Similarly, where part of an oral statement is given in proof as an admission, the declarant may offer the balance of such statement in explanation of his declaration; without, however, being allowed to make evidence for himself by use of collateral material. *Granger v. Farrant*, 179 Mich 19, 146 NW 218.

Relevancy to Issue

It is a basic rule that a statement sought to be admitted an admission must be relevant to the issues involved in the case. The question of relevancy is to be judged by the same standards as any other form of evidence. It may be further noted that once having satisfied the initial test of relevancy, an admission becomes admissible notwithstanding the transaction to which it directly relates, or out of which it originated, is itself not relevant to the issues. *Meyers v. San Pedro L. A. etc. R. Co.* 36 Utah 307, 104 Pac 736.

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ADMISSION CONTAINING OPINIONS OR CONCLUSIONS

Q—You are the defendant in this case?

Q—You heard the testimony of the plaintiff and certain witnesses relative to an accident on December 5th, 1944, involving your car?

Q—Will you please tell this court and jury what you know of this accident. A—I was driving my car north on Lee Avenue when the defendant's car going west passed a stop sign and struck the right rear of my car, etc.

Q—Please describe what took place immediately after this collision.

Q—Did you have any conversations with the defendant following the accident? A—Yes.

Q—Describe this first conversation, as near as you can recall. A—The defendant, John Brown, told me that he thought he did not see the stop sign until he had already passed the intersection—

(Defendant's counsel: Objected to, on the ground such statement is not a positive statement of fact, but a mere opinion. Court: Overruled.)

Q—Where and when did this conversation take place?

Q—What other conversations did you have with the defendant respecting the occurrence of this accident? A—On the following day, I met the defendant in traffic court, etc.

Q—Will you tell us the substance of this conversation, as near as you can recall? A—He stated that "if I did not pass that stop sign this accident would not have happened."

(Defendant's counsel: Objected to, on the ground the defendant merely expressed a conclusion upon one of the matters at issue.

Court: Overruled.)

Q—Was that the last conversation you had with the plaintiff? A—No, on the day following that he met me on the street and stated that he would like to see me get something in court.

(Defendant's counsel: Objected to, as being no more than a conclusion upon a matter of law outside the province of the witness to know about or to concede.

Court: Sustained.)

(An admission clearly irrelevant to the issues is inadmissible, notwithstanding it contains a statement against the interest of the declarant.)

The rule is generally stated that the admissibility of an admission against interest is not affected by the fact that such admission contains matters in the nature of an opinion, conclusion, or inference. Where the declaration contains such matters, courts have held where the issue is raised that the presence of such qualifying factors affects the weight, rather than admissibility, of the statement. *Grodsky v. Consolidated Bag Co.* 324 Mo 1067.

Thus, in one case, involving an action by a passenger in an automobile against the driver of the car and the owners of a truck involved in the collision causing the passenger's injuries, a statement was made by the passenger to the effect that in her opinion it was the truck driver's fault, was held admissible, notwithstanding the opinion character of the declaration. The court stated:

"Plaintiff's statement that it was her 'opinion the truck driver was entirely responsible for the accident,' was inconsistent with her subsequent action in attempting to place the blame upon other parties." *Grodsky v. Consolidated Bag Co.* *ibid.*

In one case the court went so far as to allow proof of a statement against interest, notwithstanding the declarant conceded had no personal knowledge about that which he spoke.

In *Read v. Reppert*, 194 Iowa 620, 190 NW 32, the defendant owner of a vehicle made a statement to the effect that the car which struck the plaintiff was "probably driving in a reckless manner." This statement was held admissible despite the fact that the declarant did not personally witness the accident.

In a similar ruling, involving an insurance policy, it appeared that the plaintiff's physician made a statement against the interest of the beneficiary, upon a matter of which he lacked personal knowledge. The court pointed out:

"It is elementary law that an admission of a party to a suit is admissible against such party without regard to whether the admission was made on personal knowledge or upon hearsay. So, too, an admission in the nature of a conclusion is admissible. In the present case, though it may be the physician's statement was based on hearsay, the plaintiff expressly warranted the statement to be true. She vouched for the truth of the statement, and thus made it her own. We think

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it was admissible against her as an admission, though, of course, not conclusive. It was for the jury to give it such weight and value as they saw fit." *Mayhew v. Traveler's Protective Asso.* 52 SW(2d) (Mo App).

The fact that a statement in the nature of an admission is clearly erroneous, will not render it inadmissible. Thus, where the defendant made a statement to the effect that the accident was his fault, this declaration was held admissible, notwithstanding his testimony tended to show otherwise. The rule was stated as follows:

"The argument is that the alleged admission of the defendant, if any, involved at best a mere opinion or conclusion on his own part, and that it involved even his conception of legal duty and liability. It is undoubtedly true that a man might have an erroneous view of the law of liability arising out of an accident, and that he might commit himself to an admission of liability which would not necessarily be binding upon him. But this fact would not necessarily render evidence of such admissions inadmissible in evidence. Taking the testimony as true, the statements ascribed to the defendant were inconsistent with his testimony as to the circumstances of the accident. If the accident occurred in the manner testified by him, there was little occasion for his saying that he was to blame for it. The testimony was admissible for this reason." *Robbins v. Weed*, 187 Iowa 64, 169 NW 773.

It has further been held that the fact that the statement containing the admission is in the form of a conclusion will not render it inadmissible. This view is illustrated in the holding that a statement in an accident report to the effect that the decedent was injured in an accident arising out of his employment, is admissible as an admission against interest. The court stated:

"Admitting, without deciding, that such statement is a conclusion of law, still we know of no rule that requires an admission to be disregarded because made in the form of a conclusion of law rather than a statement of fact." *Hegge v. Tompkins*, 69 Ind App 273, 121 NE 677.

In one case, the trial court instructed the jury:

"If you believe from the evidence that the plaintiff made use of some expression that 'it was all my fault,' such expression

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was only a conclusion of the plaintiff, and not the statement of a fact, and would not amount to an admission of negligence." The higher court reversed the judgment in favor of the plaintiff, upon the ground that the declaration was in the nature of an admission against interest and should have been received in evidence, notwithstanding it contained a conclusion of law. *Warner Gear Co. v. De Peugh*, 70 Ind App 264, 123 NE 363.

In some instances, however, courts have excluded statements in the nature of admissions where they contained opinions or conclusions. Thus, in one case it was held that the statement by an injured pedestrian to the effect that the accident would not have happened if one of the two colliding cars had not lost control of his machine, was inadmissible as being a mere conclusion. *Miller v. Week*, 186 Ky 552, 217 SW 904.

See also *Lowery v. Zorn*, 157 So 826 (La App) where the court stated: "Responsibility for an accident is a mere conclusion. A party to a collision is not bound by a statement that he does not hold the other responsible."

While it seems clear that the majority of the courts favor the admission of statements against interest, notwithstanding their opinion character, it seems equally clear that not every statement against interest can be classed as an admission. Where to draw the line depends upon the facts and circumstances of each case. Thus, where a defendant who possesses no knowledge personally of an accident, states to the plaintiff: "Well, you were hurt here and entitled to damages, and I would like to see you get them.", it was held that such a statement, while against the interest of the declarant, is totally devoid of any concession of fact, and hence inadmissible. *Hilton v. Hayes*, 154 Wis 27, 141 NW 1015.

The court pointed out, in the case last cited, that while "an admission not based on personal knowledge may be admissible under certain circumstances . . . it is certainly not prejudicial error to exclude a statement of such an indefinite and equivocal character as the present, when made by a witness who has no personal knowledge of the facts."

In *Strickland v. Davis*, 221 Ala 247, 128 So 233, the rule was stated as follows:

"A declaration of a pure opinion of law could not be evidence of legal liability. But a declaration of a party, touch-

ing a transaction known to him, that he was at fault, whether intended as an expression that he was legally at fault, or of conscious wrongdoing as between man and man, is admissible in a case of this character. Although the judgment thus expressed be one of mixed law and fact, if at variance with the contention made on the trial, such declaration is a circumstance to be weighed by the jury, not as binding or conclusive, but to be considered along with all the evidence in passing upon the question of legal liability."

ACKNOWLEDGMENT, PROOF OF

The fact that a certificate of acknowledgment accompanies an instrument is generally held to be presumptive, but not necessarily conclusive, evidence that the instrument has been duly and properly executed. *Albany County Savings Bank v. McCarty*, 71 Hun(NY) 227, 24 NY Supp 991.

The construction of this broad rule depends, however, upon the statutory provisions of the particular jurisdiction. In some states, such acknowledgment is conclusive proof of due execution in the absence of proof of fraud in the execution. *Moore v. Bragg*, 212 Ala 481, 103 So 452; *McReynolds v. State*, 288 Ill 22, 122 NE 860.

The party offering the acknowledgment has the burden of proving its validity in the state where executed; upon meeting such burden the instrument is deemed validly executed, notwithstanding its invalidity under the laws of the state where offered in evidence. *Kruger v. Walker*, 94 Iowa 506, 63 NW 320.

An acknowledgment may not ordinarily be established by oral proof; it must be shown by the certificate of the executing officer. *Solt v. Anderson*, 71 Neb 826, 99 NW 678.

It has been held, however, that the acknowledgment to a lost deed may be established by parol evidence. *Daniels v. Creekmore*, 7 Tex Civ App 573, 27 SW 148.

Trivial defects in an acknowledgment will not ordinarily void the instrument involved, provided the certificate substantially complies with the statutory requirements. *Smith v. Boyd*, 101 NY 472, 5 NE 319.

ADMISSION TO PROVE STATE OF MIND

A wide variety of admissions have been received to show state of mind of the declarant. Thus, such factors as intent or malice have been held properly proven by admissions of the person involved. *Parks v. Marshall*, 322 Mo 218, 14 SW (2d) 590; *State v. Cooper*, 170 NC 719, 87 SE 50.

Within this rule courts have held that admissions may be used at the trial to show notice or knowledge on the part of the person making the same. For example, the declarations of an infant may be proven to establish knowledge on his part of the dangers of a specific hazard. *Coons v. Pritchard*, 99 Fla 362, 68 So 225.

The fact that statements sought to be proven as admissions are not true will not affect their admissibility, provided the other requirements for their admissibility are satisfied. *Wilkinson v. Service*, 249 Ill 146, 94 NE 50.

Declarations may be used to show unsoundness of mind, malice, intent, freedom of action, or any other specific emotional or mental state. See 20 Am Jur p 492.

Testimony to the effect that the defendant had previously stated his intent to give certain property to his daughter, has been held admissible in an action against him for specific performance of an alleged obligation to make such conveyance. *Burlingame v. Rowland*, 77 Cal 315, 19 Pac 526.

ADMISSION BY ATTORNEY, AS BINDING ON CLIENT

An attorney binds his client by admissions made during the course of a trial, where such declarations are made formally and in the regular course of the proceeding, and for the specific purpose of dispensing with formal proof of the facts. But this power does not extend to admissions made by the attorney outside of court, and not made for the specific purpose of formally dispensing with proof of the facts. *Meginnes v. McChesney*, 179 Iowa 563, 160 NW 50; *Standard F. Ins. Co. v. Smithart*, 183 Ky 679, 211 SW 441; *Vietor v. Spalding*, 199 Mass 52, 84 NE 1016.

A statement of opinion by an attorney as to the merits of the case are not admissible against his client, nor is a statement conceding the truth of certain claims made by the adverse party. Such statements are all regarded as extrajudicial, and not made during the course of a judicial proceeding. *Annotation* 97 ALR 382. The fact that an agent occupies the status of an attorney will not change his essential character as an agent, so as to make his admissions receivable against the principal. *Vietor v. Spalding*, 199 Mass 52, 84 NE 1016.

In one case it was held that an admission by an attorney in a letter to the representative of the maker of a note, to the effect that the note was a gift to his client, is admissible in an action on the note. *Meginnes v. McChesney*, 179 Iowa 563, 160 NW 50.

Similarly, it has been held that declarations by an attorney in a collection letter, relative to the character or extent of an obligation, may become admissible, where the attorney was fully authorized to act for his client. *Ibid.*

SPECIFIC MATTERS

ADMISSION BY AGENT, PROVING AGAINST PRINCIPAL,
GENERALLY

- Q—You are the plaintiff in this action?
- Q—Did you, on or about the 8th day of December 1943, visit the store of the defendant?
- Q—Do you recall the exact date?
- Q—What was your purpose in visiting the defendant's place of business? A—To purchase a gas heating unit for my home.
- Q—With whom did you speak in the defendant's store? A—John Carey, one of the men behind the counter of the store.
- Q—Do you recall what you asked this man when you first spoke to him? A—I asked for a gas heating unit for a home of eight rooms.
- Q—Will you now tell this court and jury, as near as you can recall, the substance of the conversation that followed between you and this man?
(The proof should disclose in detail the nature of the representations made by the agent of the defendant.)
- Q—Did you describe in detail the character and size of your home?
- Q—Tell this court and jury what you said in that connection.
- Q—Did you request a specific size of gas heater? A—No, I asked the salesman for a heater that would service a house the size I described.
- Q—And what was the reply, if any, of this salesman? A—He suggested a No. 4 heater.
(The proof should disclose the circumstances surrounding the position or agency of the salesman.)
- Q—Did you thereafter make a purchase at this store? A—I did.
- Q—And what did you buy? A—A No. 4 gas heater.
- Q—Did you buy this heater in reliance upon the representation made by the salesman?
(Did the plaintiff make any prior purchases from the defendant, through this salesman?)
- Q—Did you thereafter use this heater?
- Q—Describe the results following the use of this heater. A—It heated only the three downstairs rooms, etc.
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TRIAL GUIDE

The broad rule is well settled that statements of an agent made within the scope of his work or employment are binding upon the principal, provided of course that the statements were made with the actual or apparent authority of the principal.

In accordance with this basic rule, it has been held that an admission by an agent made during the course of his duties and within the scope of his authority, in the line with the business contemplated by his agency, is admissible against the principal. *La Abra Silver Min. Co. v. United States*, 175 US 423, 44 L ed 223; *U. S. Fidelity & G. Co. v. Millonas*, 206 Ala 147, 89 So 732, 29 ALR 520; *Carney v. Hennessey*, 74 Conn 107, 49 Atl 910; *Summers v. Hibbard*, 153 Ill 102, 38 NE 899; *Conklin v. Consolidated R. Co.* 196 Mass 302, 82 NE 23.

Thus, it has been held that the statements of an agent as to the terms of sale made during the course of a sale, are admissible as admissions against the principal, where such statements relate to the business of the principal, and are within the scope of the agent's duties. *Tuttle v. Brown*, 4 Gray(Mass) 457, 64 Am Dec 80.

Similarly, the rule has been propounded that the knowledge of the agent as to the purpose to which the buyer intended to apply the article purchased, may be imputed to the principal. *Bratberg v. Advance-Rumely Thresher*, 61 ND 452, 238 NW 552, 78 ALR 1338.

In the case last cited, it was held that where the question arose as to the reasonable fitness of certain machinery for the purposes for which it was purchased, the knowledge of the seller's agent as to the disclosed intent of the purchaser, may be proven against the principal, to show that the latter knew of the purpose for which the buyer intended to use the article purchased.

The three basic conditions that must be fulfilled as a prerequisite to the admissibility of an agent's statements are as follows:

- 1—The statement must be within the scope of the real or apparent authority of the agent.

- 2—It must appear that the statement was made during the continuance, or existence, of the agency.

- 3—The agent must have been acting in the discharge of a regular duty at the time the statement was made, such duty

being one that arose out of the relationship of principal and agent.

The applicability of the rules is illustrated in the holding that the admissions of a manager of real estate, relative to the condition of the title of the owner thereof, are inadmissible against the latter for the purpose of disparging the title. *Sweeney v. Sweeney*, 119 Ga 76, 46 SE 76.

The burden of proving the existence of the agency rests with the party seeking to establish the admissions of the agent as binding on the principal. The form and character of this proof depends upon the facts and circumstances of each case.

Generally stated, the agency need not be established by direct proof of the existence thereof, as by documentary or factual proof, but may be shown from the conduct of the parties involved in the transaction, and the surrounding facts and circumstances. *Rosenstock v. Tormey*, 32 Md 169, 3 Am Rep 130. Where proof of the admission is sought to be made before proof of the existence of the agency, it has been held to rest within the discretion of the court whether to allow such proof subject to connection later in the trial. *First Unitarian Society v. Faulkner*, 91 US 415, 23 L ed 283.

A limitation upon the rules above stated is generally stated to exist where the admissions are sought to be proven for the purpose of establishing the agency itself. Thus, it is clear that the fact of the agency itself must be established by proof separate from the admissions themselves. *Friend Lumber Co. v. Armstrong Bldg. Finish Co.* 276 Mass 361, 177 NE 794; *Theisen v. Detroit Taxicab & Transfer Co.* 200 Mich 136, 166 NW 901; *Taylor v. Commercial Bank*, 174 NY 181, 66 NE 726.

Statements made by an agent relating to a past transaction are inadmissible against the principal, upon the theory that they are not made during the continuance of the agency, or in the discharge of the agent's duties. *Hartman v. Thompson*, 104 Md 389, 65 A 117.

TRIAL GUIDE

ADMISSION BY DECEASED PERSON

Q—You have heard the testimony of the plaintiff's witnesses relative to an accident on April 30th, 1944 involving the late Gerald Doorman?

Q—Will you please tell this court and jury what, if anything, you know of this accident? A—I helped carry the injured man to the corner drug store.

Q—Did you see the accident itself? A—No.

Q—Where was the injured person when you first saw him? A—He was sitting in the street, etc.

Q—Describe his physical appearance at that time, as near as you can now recall.

Q—Did you talk to the injured person? A—Yes, I asked if he could stand up, etc.

Q—Did he reply to you at that time? A—No.

Q—Did he appear to understand the nature of your question? (Plaintiff's counsel: Objected to, as calling for a conclusion on the part of the witness. Court: Sustained.)

Q—Did he give you any indication that he heard your question? A—He just shook his head.

Q—What did you then do? A—I helped two other men carry him to the corner store.

Q—How long did you stay with the injured man in the store? A—About a half hour.

Q—Did you have any conversations with him during that time? A—Yes.

Q—Will you please tell this court and jury the substance of these conversations as near as you can recall. A—I asked him how it happened, and he said he ran into the car, etc. (Plaintiff's counsel: Objected to, upon ground the declarant is shown to have lacked the necessary understanding of the nature of his statements. Court: Overruled.)

Q—How did the injured man look to you at that time? Describe his physical appearance.

Q—What persons were present at the time he made that statement?

Q—Did the injured person carry on any further conversations with you, or any other person present there?

Q—Was he conscious during the entire period of time he remained in the store?

(Plaintiff's counsel: I move to strike from the record all statements made by the decedent upon the ground he is not present to explain or contradict the witness as to the remarks supposed to have been made by him.

Court: Objection overruled. The admissions against interest of a deceased person are admissible in an action for the wrongful death of such person.)

Q—You are the defendant in this action? A—I am.

Q—You heard the testimony of Mrs. Catherine Lee, administratrix of the estate of the late John Lee, that you hold certain property belonging to the estate? A—Yes.

Q—Do you have this property in your possession at this time? A—Yes.

Q—Describe the property in detail. A—It consists of eleven turret lathes, a milling machine, etc.

Q—By what means did you acquire this property?

Q—How long have you held the property?

Q—Did you have any conversations with the decedent relative to the title or ownership of these articles? A—Yes.

Q—When was the last conversation you had with the decedent on this point?

Q—What statements if any did the decedent make at that time respecting the ownership of these articles?

(Plaintiff's counsel: Objected to, on the ground that statements made by the decedent in compromising a dispute are inadmissible.

Court: Overruled.)

Q—Repeat these statements as near as you can recall. A—He said the property belonged to Alfred Brown, who had loaned it to him, etc.

Q—Who was present at this conversation? A—William Grantham.

Q—You heard the testimony of the defendant in this action? A—Yes.

Q—You heard him testify you were present at a certain conversation between him and the decedent?

Q—Were you present at that time? A—Yes.

Q—Will you tell this court and jury what, if anything, you heard the decedent say to the defendant respecting ownership of certain property in the defendant's possession.

The fact that the declarant is deceased will not operate to render inadmissible his admissions against interest; they are admissible to the same extent and subject to the same restrictions generally applicable to admissions of a party alive. *Georgia R. etc. Co. v. Fitzgerald*, 108 Ga 307, 34 SE 316; *Hughes v. Delaware etc. Canal Co.* 176 Pa St 254, 35 Atl 190.

It has further been held that such admissions of a deceased person are admissible even as against third persons. This type of proof has been admitted in a wide variety of situations, and statutes have been enacted in many jurisdictions to govern the admissibility of admissions of a deceased person.

Courts have admitted the admission against interest of a donor, since deceased, relative to the existence of an alleged trust for the benefit of a specific donee. *Reynolds v. Kenney*, 87 NH 313, 179 Atl 16, 98 ALR 751.

It has been further held that the admissions of a devisor may be admitted against his devisee, and the declarations against interest of an intestate generally may be used against his administrator. *Broadbuss v. James*, 13 Cal App 464, 110 Pac 158; *Hale v. Monroe*, 28 Md 98; *Hurlburt v. Hurlburt*, 128 NY 420, 28 NE 651; *Woody v. Schaaf*, 106 Va 799.

In an action by an administrator against the widow of the intestate for conversion of certain property, it has been held that the declarations of the intestate to the effect that he did not own the property involved, was admissible, upon the theory that such statements constituted declarations against interest. *Cox v. Baird*, 11 NJL 105, 19 Am Dec 386. This type of proof has also been admitted in actions for wrongful death. *Walker v. Brantner*, 59 Kan 117, 52 Pac 80. In an action for determination of a boundary dispute, such declarations have also been admitted.

**ADMISSION, ATTEMPT TO INFLUENCE WITNESS
AS CONSTITUTING**

(Proof of attempt to influence a witness as constituting an admission)

- Q—How long have you known the defendant in this action?
- Q—Under what circumstances have you known the defendant?
- (Establish in detail the background of the relationship, if any, between the defendant and the witness sought to be influenced.)
- Q—Do you recall the 6th day of October, 1944?
- Q—Do you recall whether the defendant in this action visited you on that date? A—Yes, he did.
- Q—Can you state where this visit took place? A—At my office in the Western Building.
- Q—At what time did the defendant visit you?
- Q—Are you able, at this time, to recall the substance of the conversation, if any, that took place between the defendant and yourself at that time? A—Yes.
- Q—Will you state, as nearly as you can recall, the substance of this conversation? A—The defendant said that if I would testify at this trial that he was not present at the Clover Inn on the evening of April 15th, 1943, he would pay me the sum of \$200.
- (The proof should develop in detail all parts of the conversation that pertain to the admission sought to be established.)

A wide variety of acts of a party to the action may be shown upon the trial as constituting an admission of a fact in issue, or any material matter relevant to the issues. Counsel should examine carefully into all surrounding facts and circumstances to ascertain whether an admission can be made out by any acts of the adverse party, expressly or impliedly. Such acts may prove more decisive and convincing than a written or spoken statement.

Courts have allowed proof of a wide variety of acts as constituting admissions. Thus, it has been held that the fact that a party about to be served with civil process, assigned his property for a consideration out of proportion to the actual value, may be shown as some evidence of his recognition of liability or guilt. Annotation: 80 ALR 1141.

Where a party seeks to dispose of his real property a day after an accident in which he is involved, it has been held by some courts that such act is competent in proving a consciousness of his fault. *Harmon v. Haas*, 61 ND 772, 241 NW 70, 80 ALR 1131.

Similarly, it has been held that attempts to destroy or conceal evidence of a material character, may be shown as some proof of an admission of the adverse effect that would follow use of such evidence at the trial. *Hall v. Pennsylvania R. Co.* 257 Pa 54, 100 Atl 1035.

It has also been held that evidence is admissible to show that a defendant approached a witness with an offer of money to be paid in the event the witness gave certain testimony upon the trial. *De Groodt v. Skrbina*, 111 Ohio St 108, 144 NE 601, 38 ALR 591.

But where the attempt to influence the testimony of a party to the case was made by one not a party to the action, as by a friend or business associate, such proof is clearly inadmissible, as not binding upon the party against whom it is sought to be offered in evidence. See cases collected in 38 ALR 598.

In another case it was held that proof is admissible showing that a corporation party to the case adopted certain rules by way of precautions to be taken under a given set of circumstances; such proof being regarded as pertinent in showing an acknowledgment on the part of the corporation that due care would exact such a course of conduct under the circumstances prescribed. *Chicago & A. R. Co. v. Eaton*, 194 Ill 441, 62 NE 784, 88 Am St Rep 161.

The precise weight to be attached to the proof offered to show an admission by conduct is a question for the jury to determine in the light of the peculiar facts and circumstances of each case.

As a matter of trial strategy it is reasonably clear that proof of the character under discussion should not be offered unless there is a definite and logical relationship between the act alleged to constitute an admission and the presumption sought to be thereby created.

Where it is necessary to offer a detailed explanation in establishing such relationship, or there remains a reasonable doubt as to the full implication of the act involved, it is wise to forego an attempt at proof of an admission, upon the ob-

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vious premise that more harm than good can result from such offer of proof.

ADMISSION, BY SILENCE OF PARTY

(Evidence of silence in face of direct accusation of liability respecting accident)

- Q—You are the defendant in this action?
- Q—You have heard the plaintiff testify about an accident on January 8th last, in which your car is claimed to have struck him? A—Yes.
- Q—Will you now tell this court and jury in your own words what happened at that time?
- Q—Did you take part in any conversations with the plaintiff at the scene of the accident? A—Yes.
- Q—Will you tell us the nature of these conversations. A—The plaintiff said the accident happened so fast he hardly knew what hit him, officer Smith told him he had walked into the side of the car, with his umbrella held open, blocking his view, etc.
- Q—How far were you from the police officer at the time he made that statement?
- Q—How far was the plaintiff from the officer at this time?
- Q—Describe the physical condition of the plaintiff.
- Q—About how long after the accident did this conversation take place?
- Q—Did you hear the plaintiff make any reply to that statement? A—No.
- Q—What, if anything, did the plaintiff say or do immediately following the making of such statement? A—He just shook his head from side to side.
- Q—Did you, at any time thereafter, hear any statement made by the plaintiff respecting the happening of the accident? A—No.
-

An admission may be implied from, and proven through, silence of a party under circumstances which call for the expression of a statement of approval or disapproval on his part. Thus, where a definite and clear-cut statement is made in the presence of a party, affecting a substantial right of such person, and he fails to make any reply thereto or comment, such silence may be construed as some evidence of an

admission of the truth of such statement provided certain conditions are met. See 20 Am Jur p 481. These conditions may be summarized as follows:

1—The party affected must have heard and fully understood the statement made. *Traders Nat. Bank v. Rogers*, 167 Mass 315, 45 NE 923. Thus, a statement made in a foreign language, or under circumstances which raise some doubt as to whether the person affected heard them, or fully understood their import, would not lay a sufficient basis for an admission by silence.

2—The statement must be made under such circumstances as would naturally call for a reply. *Mudd v. Cline Ice Co.* 101 W Va 11, 131 SE 865. Thus, a mere comment by a person upon the interests or rights of another, made in the presence of the latter, might not necessarily call for a reply by way of approval or disapproval.

3—The statement must be made by such persons as would tend to elicit a reply from the party affected by the statement. *Wilkins v. Stidger*, 22 Cal 231, 83 Am Dec 67. For example, a statement made by a person with whom the subject of the statement is unfriendly, or not on speaking terms, might not call for a reply.

4—The truth or falsity of the statement must be within the immediate knowledge of the person affected, and whose silence is sought to be construed as an admission. *Tiffany v. Ellison*, 266 Mo 604, 182 SW 996. Comment upon a matter which lays outside the immediate sphere of knowledge of the person whose interests might be affected thereby, does not call for a reply. Persons are not presumed as inclined to speak about matters they know little or nothing about. *Donker v. Powers*, 230 Mich 237, 202 NW 989.

5—The statement must be made under circumstances which allow conveniently, and naturally, for a reply, or the free expression of an opinion. *People v. Pfanschmidt*, 262 Ill 411, 104 NE 804.

The lack of an opportunity to freely express a dissent or approval of a statement made, would destroy any implication of admission of the truth or falsity of such statement from the mere fact of silence.

According to some authorities, an admission may be im-

plied from evidence tending to show that a party failed to reply to a written communication containing statements which the recipient of the letter would naturally, in the ordinary course of events, deny in a written reply if the statements therein contained were untrue. Annotation: 55 ALR 460. A failure to reply in such situation is obviously of less weight than a failure to reply to an oral statement. Annotation: 8 ALR 1163.

But there is ample authority which holds that a failure to reply to a written communication does not constitute competent evidence of an admission of matter which should have been promptly denied in a reply letter. Annotation: 55 ALR 460. The theory upon which the latter ruling is based is that people are more inclined to promptly deny orally matter of an untrue character affecting their interests, than they are inclined to pick up a pen and write a denial. Annotation: 55 ALR 460.

The rule holding that evidence of silence is competent upon the question of admission of liability or guilt has been applied to silence regarding an accident. Annotation: 76 ALR 1392. Thus, it has been held that the failure of a party to reply to a direct and unqualified accusation of liability, may be construed as an admission of the truth of such statement.

The circumstances surrounding the making of the statement must be such as naturally and logically call for a denial or explanation. Thus, where the party against whom the accusation is directed is in such physical or mental condition as to prevent full comprehension of the nature of the statement, his silence does not constitute sufficient evidence upon which to base an admission of the truth of the statement. *McCord v. Seattle Electric Co.* 46 Wash 145, 87 P 491.

The failure of a party to promptly deny statements given in the form of testimony at a trial does not obviously constitute any evidence of an admission of the truth thereof, upon the familiar theory that it is not the duty or right of a litigant to interrupt the orderly course of a trial with denials or explanations; although it is clear that failure of a party to take the witness stand to deny or explain material matter offered by the adverse party, may constitute a sufficient basis for the inference that he has thereby admitted the truth of the hostile statements. *Howe v. Howe*, 199 Mass 598, 85 NE 945.

ADMISSION DURING SETTLEMENT NEGOTIATIONS

(Proof of an admission of indebtedness during course of settlement proceedings)

Q—You are the plaintiff in this action?

Q—Did you, on or about the 8th day of July 1943, have a conversation with the defendant in this case? A—I did.

Q—Where was this conversation held?

Q—Do you recall the exact date that you met the defendant?

Q—Will you now tell this court and jury, as near as you can recall, the substance of this conversation. A—I asked the defendant, Harold Land, what he thought was the correct amount of the account outstanding against him in my books.

(Defendant's counsel: Objected to upon the ground that the plaintiff's statement is self-serving, and assumes the truth of facts not yet proven.
Objection sustained.)

Q—Was there any mention during the course of this conversation of an account involving the defendant and yourself as parties thereto? A—Yes.

Q—Will you tell us now, as near as you can recall, the nature of any statements made by the defendant, regarding this account. A—He said that, according to his computations, the correct amount of the account was \$457.

(The proof should develop in detail the nature of the conversation in which the admission is made, and the unqualified character of such admission; it is for the defendant to rebut this proof by showing that the admission was made during the course of settlement discussions, or with an express pledge of secrecy or other reservation.)

The broad rule is generally stated that an offer of compromise may not, directly or indirectly, be offered in evidence as an admission of liability or guilt. *Brice v. Bauer*, 108 NY 428, 15 NE 695; *Wrynn v. Downey*, 27 RI 454, 63 Atl 401. This rule applies whether the offer is made orally or in writing. *Home Ins. Co. v. Baltimore Warehouse Co.* 93 US 527, 23 L ed 868.

At the same time, however, it has been held that the fact that a document contains an offer of compromise does not render it inadmissible in evidence where it contains material

evidence of a relevant character. *Kennel v. Boyer*, 144 Iowa 303, 122 NW 941.

It has been further held that material facts admitted during the course of settlement negotiations may become admissible in evidence where the admissions of such facts are independent of the offer of compromise; but it is clear that such admissions are inadmissible if made in furtherance of the compromise, or in reliance upon their confidential character, or where they assume the form of a hypothetical or qualified assertion, as distinguished from a positive statement of fact. *Kimball v. Boyer*, 144 Iowa 303, 122 NW 941. Annotation: 80 ALR 924.

The question of separability in cases of this character is dependent upon the peculiar facts and circumstances of each case.

Thus, it has been held that an admission, positive and unqualified in character, to the effect that a stated account is correct, made during the course of a negotiation for settlement of the controversy, is admissible in evidence as an admission, it appearing that such admission was relevant and material upon the issues involved, and was made without prejudice or reservation. *Parkersburg v. Smith*, 76 W Va 246, 85 SE 516.

A statement made by a party for the purpose of persuading another not to institute suit upon a claim outstanding, is not regarded as privileged or incompetent upon the ground that it is made during the course of settlement negotiations.

It is clear from the foregoing discussion that all conversations or written negotiations looking toward a settlement should be devoid of any positive admissions of facts or matters in issue, and that where it is essential to make an admission to further the settlement, such admission should be clothed with an express reservation that it is made without prejudice and solely for the purpose of facilitating the settlement negotiations.

SPECIFIC MATTERS

ADMISSION AFFECTING PARTNER'S RIGHT OR INTEREST

Q—You are the plaintiff in this action?

Q—In what business are you engaged? A—Manufacture of machine tools.

Q—When was the first time you saw the defendant, John Blake? A—On July 7th, 1944.

Q—Where did you see him at that time? A—He appeared at my factory on that date.

Q—Did you have a conversation with the defendant?

Q—Will you please tell this court and jury, as near as you can recall, the substance of this conversation. A—The defendant stated that he understood I was not satisfied with certain sub-contract work that I let out to his firm, and asked me to state the nature of my complaint.

Q—What, if anything, did you state in response to that request. A—I described the nature of the defective parts, and showed several samples to Mr. Blake.

Q—Describe the nature of this work.

Q—When was the defendant engaged to perform such work?

Q—With whom was the contract entered into?

(Defendant's counsel: I object to the form of the question. There is no proof that a contract was ever entered into between the parties hereto.

Court: Objection sustained.)

Q—Describe the events leading up to defendant's participation in your manufacturing activities.

Q—With whom did you make such negotiations? A—With John Blake and with William Saxe.

Q—Did they make any representation to you respecting their relationship to each other? A—They told me they were partners under the name of Blake and Saxe.

Q—Who made such representations, and at what different times?

Q—I show you several letters, dated from June 13th, 1944 to December 3rd, 1945, and ask if you can identify them.

A—Yes, they were received by me during the regular course of my business.

(The proof should cover all details tending to show the partnership relation, and that the transaction involved fell within the class of partnership business.)

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Q—I now show you a document, purporting to be a written contract between Blake and Saxe and yourself, acting for the Acme Steel Co. and ask if you can identify the signatures thereon? A—Yes, the first signature is that of Mr. Blake, made in my presence.

Q—Referring now to July 7th, 1944, will you tell this court and jury, as near as you can recall, what representation, if any, the defendant John Blake made with respect to the defective parts? A—He told me the defects were caused by the lack of proper machines, etc.

(The admission should be identified as clearly as possible, as to form, content and circumstances of utterance.)

(The defendant may show, in explanation of the admission, the balance of the statement made, or any excerpt therefrom omitted by the plaintiff.)

(Cross-examination of partner as to entries in partnership books.)

Q—I show you plaintiff's exhibit 4, and ask you to turn to page 9. Can you identify the handwriting of the entries on that page?

Q—In whose custody was this book on the date shown on page 9, namely August 7th, 1944?

Q—Did you have occasion to personally make any entries on that page?

Q—Are you familiar with any of the matters to which such entries relate?

Q—Do you have occasion to examine the books of the partnership from time to time?

Q—Do you recall ever examining this particular page? A—No.

Q—It is, however, possible you did look at this page? A—Yes.

Q—Assuming you did look at this page, and found yourself in disagreement with an entry made therein, would you have caused a change to be made therein?

It is well settled that a declaration by one member of a joint venture or undertaking may be used against the other members. Under this broad principle, the admissions of a partner are properly used against the partnership or other members of the firm, where the statements relate to partnership business. Thus, the entries of one partner in the part-

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nership books may be used against the others. *Collett v. Smith*, 143 Mass 473, 10 NE 173.

The theory upon which such statements are admitted in evidence is that by entering into a partnership, or other joint venture, the members thereof constitute each other agents for all purposes and matters related to the joint interest. *Caswell v. Maplewood Garage*, 84 NH 241, 149 Atl 746.

The two basic requirements for use of statements by one partner against the other are that they pertain to matters within the scope of the partnership, and that the declarant was acting on behalf of the partnership, or as a partner, at the time he made the admission. *Mansfield v. Howell*, 218 Mo App 557; *Looney v. Bingham Dairy*, 75 Utah 53, 282 Pac 1030.

Accordingly, it is clear that an admission made by a partner upon matters unrelated to the business of the partnership, or at a time and circumstance when he was acting for his own behalf, is not admissible against the partnership itself. It has further been held in this connection that where each member of the partnership firm makes the same statement, unrelated to the business of the partnership, the fact that all have made substantially similar statements will not thereby render the statements so made admissible in evidence against a single one of the partners. *Caswell v. Maplewood Garage*, 84 NH 241, 149 Atl 746.

Admissions contained in the pleading of one partner are properly used in evidence against the other partners, provided such admissions were made while the partnership relation still existed.

The fact that a partner is hostile to the other partners may be shown to affect the weight properly accorded the admission of such partner, but the fact of such hostility alone will not serve to exclude the admission. *Burgan v. Lyell*, 2 Mich 102, 55 Am Dec 53; *Western Assurance Co. v. Towle*, 65 Wis 247, 26 NW 194.

ADMISSION UPON TITLE, OWNERSHIP OR POSSESSION

(Testimony of witness as to declaration of plaintiff upon ownership of property)

- Q—Do you know the defendant in this action?
- Q—How long have you known the defendant?
- Q—Did you have occasion to visit the place of business of the defendant about June 4th, 1944?
- Q—What was the occasion of your visit? A—To buy a Gautier painting that had been advertised for sale.
- Q—Did the defendant show you this painting? A—Yes.
- Q—Could you identify this painting if you saw it once more? A—Yes.
- Q—I now show you a painting, marked as plaintiff's exhibit A, and ask whether you can identify this object as the one you saw at the defendant's store? A—Yes, it is the same.
- Q—Now will you tell this court and jury, as near as you can recall, the nature of any conversations between the defendant and yourself respecting this painting.
(Admissions by a party are admissible tending to show ownership in a third person of property involved in an action; see text.)
- Q—Do you recall the exact date of this conversation?
- Q—Who was present at this conversation, other than the defendant and yourself?
(Admissions may also be used in issues involving title to property held under adverse possession; see text.)
-

An admission of a party may be admitted in evidence in determining issues relating to the right of possession, or title, to property, real or personal. *Wipperman v. Robbins*, 23 ND 208, 135 NW 785.

Thus, it has been held that the declaration of the possessor of personal property, relative to the nature and extent of his interest therein, may be used in evidence against him, notwithstanding such admission was not made in the presence of the person asserting superior right or title to the property. *Avery v. Clemons*, 18 Conn 306, 46 Am Dec 323.

The rule has also been stated that where a party asserts title by virtue of adverse possession, his statements relative

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to the nature of his possession or the character of his tenancy, may be admitted in evidence against him, where such statements tend to show that he did not hold possession with intent to claim a superior title or right. *Tarver v. Deppen*, 132 Ga 798, 65 SE 177.

The courts have held the rule last stated applicable to admissions against the party making same (*McDowell v. Goldsmith*, 6 Md 319, 61 Am Dec 305; *Baker v. Haskell*, 47 NH 479, 93 Am Dec 455; *Beecher v. Parmele*, 9 Vt 352, 31 Am Dec 633) as well as where such statements tend to prove title in a third person. *Crawford v. Witherbee*, 77 Wis 419, 46 NW 545.

While the general rule is that statements of a party relative to ownership of property may not be used to sustain such ownership or title in himself, it is clear that a declaration of a party relative to the character of his possession of property involved in an accident may be used against him where he disclaims title or control in the property alleged to have been connected with the accident. The same rule would apply in the case of a transfer of a chose in action. *Kimball v. Huntington*, 10 Wend(NY) 675, 25 Am Dec 590.

The admissions of a party relative to execution of a note may also be admitted to establish his connection with such instrument. *Donohoe's Estate*, 271 Pa 554, 115 A 878.

Similarly, an admission by a person working upon goods that such property belongs to third persons, may be admitted in evidence against such person upon a trial involving ownership thereof. *Bradley v. Spofford*, 23 NH 444, 55 Am Dec 205.

It has also been held that a statement by a party owning land alleged to have been dedicated to public use, may be used against him where the effect of such declaration is to show that he intended to make such dedication. *State v. Catlin*, 3 Vt 530, 23 Am Dec 230.

ADMISSION OF THIRD PERSON, USE AGAINST PARTY

(Proving admission of one joint covenantor in an action
against other covenantors)

Q—You are the plaintiff in this action?

Q—Did you, on or about the 8th day of March, 1943, enter into an arrangement with James Hall, for the production of a series of stories and short plays? A—I did.

Q—Do you recall the exact date you made this arrangement?

Q—I show you what purports to be a written contract between James Hall and yourself, dated March 8th, 1943, and ask if you recognize this document? A—Yes, it is the document we both signed on that day.
(Offered in evidence as plaintiff's exhibit.)

Q—Prior to the date of this contract did you have any conversation with William Jones relative to James Hall?
A—Yes.

Q—Will you tell this court and jury the nature of this conversation.

(Defendant's counsel: Objected to, as not binding on the defendant.

Court: It will be received, subject to connection.)

A—Jones said he was interested in the foreign rights of publication of Hall's work, and offered to indemnify me against any losses in the venture if I agreed to give him exclusive rights of publication outside this country.

Q—What was your reply to this offer? A—I said I would accept this offer if the defendant Albert Ward joined him in this indemnification.

Q—What happened thereafter between you and these parties? A—An arrangement was entered into between the three of us.

Q—I show you a document, purporting to be signed by James Hall, Albert Ward and yourself and ask if you recognize this paper? A—Yes, it is the agreement of indemnity I just described.

(Offered in evidence as plaintiff's exhibit.)

Q—Thereafter, did you have any conversations with Jones relative to this document?

(Defendant's counsel: Objected to as violating the parol evidence rule.

Plaintiff's counsel: I ask that the testimony be received, subject

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to proof that it falls within an exception to the parol evidence rule, namely that it supplies an essential omission from the agreement.)

Q—Will you please tell this court and jury the substance of these conversations?

(Defendant's counsel: Objected to as not binding on the defendant Hall.

Court: The admissions or declarations of one covenantor are binding and admissible against another bound by the same covenant.)

The broad rule is well settled that statements of a third person are not admissible against a party to the action; notwithstanding such statement contradicts a declaration of the party to the action, or constitutes an admission by the latter. *Barfield v. South Highlands Infirmary*, 191 Ala 553, 68 So 30; *Clark v. Wilson*, 127 Ill 449, 19 NE 860; *Howell v. Mandelbaum*, 160 Iowa 119, 140 NW 397; *Cacy v. Slay*, 127 Md 493, 96 Atl 690.

Thus, a conversation between an agent of a party to the action, and the opposing party, is not admissible against the former on the theory that such conversation contains an admission against such party. *Elcox v. Hill*, 98 US 218, 25 L ed 103.

Similarly, an admission by a driver of a truck owned by the defendant is not admissible against the employee, notwithstanding such admission is pertinent on the question of liability.

The obvious remedy for counsel to pursue, in a case where an agent of the defendant has made an admission relevant to liability, is to make such agent or employee a co-defendant, in which event the declaration becomes admissible, upon the same theory any adverse statement may be used against a party to the action.

Where a party has expressly consented to allow a third person to bind him, the admissions of such person may be used against the party. *De Votie v. McGeer*, 15 Colo 467, 24 Pac 923; *Craig v. Craig*, 3 Rawle(Pa) 472, 24 Am Dec 390.

In the event that a party has specifically adopted the statement of a third person as his own, or has made an appointment of another for the express purpose of making such declaration, such admissions are binding to the same extent as

made by the party himself. *Quirk v. Bedal*, 42 Idaho 567, 248 Pac 447.

It has also been held that the statements of one person may be used against the other where the interests of the two parties are so intermingled, or there exists such a community of interest, as to create an implied authority of one to speak for the other. *Simmons v. Vulcan Oil Co.* 61 Pa 202, 100 Am Dec 628; *Greenbaum v. Stern*, 90 Wash 156, 155 Pac 751.

But the mere existence of a joint interest will not create such implication, or make the admissions of one joint owner admissible against the other. To illustrate the distinction, the admissions of one of several joint covenantors, upon a matter directly related to the covenant, is admissible in evidence against the other covenantors. *Costelo v. Cave*, 27 Am Dec 404 (SC).

ADMISSION, HUSBAND AND WIFE

- Q—When was the last time you visited the store of the defendant in this action?
- Q—Whom did you speak to upon that occasion? A—Mrs. Miles, the defendant's wife.
- Q—Prior to that occasion, did you visit this store, and for what purposes? A—I visited the store once a month to sell them paper bags, twine and other accessories, etc.
- Q—Did you collect for deliveries that were made? A—Yes.
- Q—Were there times when you were paid by persons other than the defendant? A—Yes, his wife often paid me.
- Q—Did you ever speak to his wife with respect to goods to be delivered? A—Yes.
- Q—Describe these occasions.
- Q—Did you ever receive an order from the wife?
- Q—Now will you tell this court and jury what, if any, statement the wife of the defendant made to you on the occasion of your last visit to the store? A—She said that the shipment of paper bags received on June 5th, last was entirely satisfactory and had been sold out, etc.
-

An admission by a husband may be received against the wife, or the wife's admission proven against the husband, where it is shown that the declarant was the agent of the party against whom the statements are admitted, and that the declarations were made within the scope of such agency. *Hartman v. Thompson*, 104 Md 389, 65 Atl 117; *Rose v. Chapman*, 44 Mich 312, 6 NW 681.

Subject to express statute to the contrary (as limitations on the right of married women to enter into contracts), either spouse may appoint the other to act as agent, so as to bind the principal by admissions against interest. This rule is entirely apart from those agency relationships created by law, as the implied agency resulting when the wife contracts for necessities and the husband becomes liable therefor. The mere fact of the marital relationship will not, standing alone, make one spouse the business agent for the other.

Thus, the admissions of a wife that her husband owes a certain debt are inadmissible against the husband, where the

proof is entirely lacking on the existence of an agency relationship. Similarly, the declarations of the husband are not admissible against the wife on the subject of her property, or business, interests, in the absence of an agency relationship. *Whitescarver v. Bonney*, 9 Iowa 480.

The marriage relationship will not permit declarations of one spouse to be used against the other for the purpose of showing liability in an action based on tort. *Lowery v. Jones*, 219 Ala 201, 121 So 704; *Worth v. Worth*, 48 Wyo 441, 49 P(2d) 649.

A wife may, of course, bind her own interests by admissions against her own interest, to the same extent as any other individual. *Hackman v. Flory*, 16 Pa St 196.

The proof necessary to establish the agency of one spouse to act for the other is not materially dissimilar from the character of proof necessary to establish agency generally. Thus, where it is made to appear that a wife acted for her husband in business, appeared at his office and transacted business for him generally, her authority to act for her husband may be thereby established, so as to make her admissions admissible against him. *Rotch v. Miles*, 2 Conn 638.

ADULTERY, PROOF OF

It is well settled that adultery need not be proven by direct testimony as to the actual acts involved; it is sufficient that such circumstances be proven as establish a fair inference as to the commission of the act. Stated differently, the evidence should be sufficiently strong to raise a presumption in the minds of reasonable men that the adultery actually took place. *Cooke v. Cooke*, 152 Ill 286, 38 NE 1027; *Aitchison v. Aitchison*, 99 Iowa 93, 68 NW 573; *Phillips v. Phillips*, 24 Misc 334, 52 NY Supp 489.

Thus, it has been held sufficient to show that a man entered a house of prostitution and remained there for a length of time. This evidence, unexplained, has been regarded as enough to create a presumption of adultery; *Phillips v. Phillips*, *Ibid*.

The fact that a man and woman occupy the same sleeping quarters is held sufficient to raise a presumption of the commission of the act of adultery. *United States v. Griego*, 11 NM 392, 72 Pac 20.

Similarly, the fact that a man and woman occupy the same bed, as is established by credible testimony remaining uncontradicted, is sufficient to raise an inference that adultery was committed. *Frey v. State*, 94 Tex Crim Rep 109, 249 SW 841.

The character of evidence required in criminal prosecutions is no different from that required in civil actions. The difference lies in the degree of proof required in each case. In the former instance, it is necessary to establish the adultery beyond a reasonable doubt, not unlike any other criminal charge. In the latter case, it is only necessary to establish the charge by a preponderance of the evidence.

The question as to what is sufficient to lay a basis for a conviction for adultery depends largely upon the penal statutes of the particular state, which should be consulted in that connection.

AGE, OPINION AS TO

- Q—Are you able to state the present whereabouts of your parents? A—My mother is deceased, my father is in another state.
- Q—When did your mother die? A—Four years ago.
- Q—Prior to the decease of your mother, did you have any conversations with her respecting your age? A—Yes.
- Q—Did you, at any time in your recollection, have any conversations with your father on the subject of your age?
- Q—And have you had occasion to inspect any family Bible or other family record for the purpose of ascertaining any entry of your age?
- Q—Describe these records. A—I examined the family Bible, and letters to father from his relatives, etc.
- Q—When did you make this inspection?
- Q—Now will you state whether you have an opinion you can render with reasonable certainty as to your age at the present time? A—Yes.
- Q—Will you so state. A—I believe my present age is forty-two.
- Q—And upon what statements of your parents do you base your opinion?
- Q—When was each of these statements made?
- Q—Now will you tell this court and jury upon what entries in the family Bible you base your estimate of age?
- Q—Is there any other data that has entered into your consideration in forming this opinion?
(The proof should make clear all data and statements tending to support the witness in his estimate of his age.)
-

(Nonexpert opinion upon age)

- Q—How long have you known the decedent in this case?
- Q—State generally the nature of your association with him.
- Q—How frequently did you see the decedent during the past two years?
- Q—When was the last time you saw him?
- Q—Do you have an opinion you can state with reasonable certainty as to the age of the decedent at the time of his death?

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A witness may testify as to his own age, notwithstanding his testimony is hearsay in character. *Terry Dairy Co. v. Nalley*, 146 Ark 448, 225 SW 887; *Koester v. Rochester Candy Works*, 194 NY 92, 87 NE 77.

The weight of such testimony is generally a question of fact for the jury to decide, according to circumstances of the case, and the nature of the supporting proof offered to corroborate the statement of the witness. *State v. Miller*, 71 Kan 200, 80 Pac 51.

There is no limitation upon the character of evidence that may be offered to support the opinion of the witness as to his age. His estimate may be based upon the statements of his parents. *State v. Rakich*, 66 Wash 390, 110 Pac 843. It may also be based upon family records and the general reputation in the family upon this point. *McCollum v. State*, 119 Ga 308, 46 SE 413.

In *People v. Pennell*, 315 Ill 124, 145 NE 606, the court stated:

"It is argued that the testimony of the complaining witness was hearsay evidence; that she knew only what her father had told her concerning her age; and that while such testimony is competent it is to be taken as of little weight. It is, of course, recognized in all cases where one testifies as to his own age that in a sense his testimony is hearsay, but that fact does not of itself affect the competency nor the weight of that testimony."

The law presumes that every person knows "his own age, and the source of information is a matter of inquiry on cross-examination. But appellant urges her evidence was not the best attainable, for the reason her father was present in court, and presumably knew as a fact what she had ascertained only on report. The evidence of the child may not be as satisfactory as that of the father or mother or some other person present at her birth, but it should be received." *State v. Scroggs*, 123 Iowa 649, 96 NW 723.

In *State v. Girone*, 91 NJL 498, 103 Atl 803, the rule was stated:

"One of the elementary rules of evidence, springing from necessity, is that when age is a fact of pedigree, it may be established by hearsay evidence. This rule has been enlarged in many jurisdictions so as to permit a person to testify to

his own age. We think the better opinion is that a person is competent to testify to his own age, irrespective of the consideration that the fact of age is one of the essentials necessary to be established in order to constitute the crime charged."

According to some decisions, it need not be shown as a prerequisite to the opinion of the witness that his parents are unavailable at the time of the trial. *State v. Rakich*, *Ibid*.

It is generally agreed that any person, shown to have had sufficient opportunity for observation, may give his best estimate as to the age of a person, where such factor is relevant to the issues, and better evidence is not available.^o *Robinson v. Blakely*, 38 SCL 586, 55 Am Dec 703. There is, however, authority denying the propriety of such practice. *Martin v. State*, 90 Ala 602, 8 So 858.

In the case of persons whose majority or minority at a specific time is involved, it is held that any person with sufficient opportunity for observation may testify as to whether the subject was over or under twenty-one years of age. Annotation: LRA1918A 687.

AGENCY, PROOF OF, GENERALLY

- Q—Do you know the parties to this action, John Gair and William G. Farr? A—Yes.
- Q—How long have you known each of these parties?
- Q—Did you have occasion to visit the place of business of the defendant, William Farr, on or about the 19th day of May, 1944? A—Yes.
- Q—Do you recall the exact date?
- Q—Did you speak to the defendant at that time?
- Q—Who else, if anybody, was present at that occasion? A—The plaintiff John Gair.
- Q—Do you recall whether a conversation took place between Gair and Farr? A—Yes.
- Q—State the details of this conversation, as near as you can recall. A—Gair asked Farr: "Where shall I deliver these machines, and how much shall I charge?" Then I heard Farr answer: "They go to the National Machine Co. Use your own judgment as to the price."
- Q—Did you hear any further conversation at that time? A—Yes, Mr. Farr stated that machines were old machines, and Gair was to get as much as he could for them.
-

The burden of proof is upon the person who alleges the existence of the agency to prove the same, not only as to its existence, but also its nature and extent. *Whitney v. Krasne*, 209 Iowa 236, 225 NW 245; *First Nat. Bank v. Montgomery*, 47 ND 97, 196 NW 95.

Thus, where a contract is made by a person in his own name, and the other party thereto seeks to hold a third person liable as an undisclosed partner, he must establish the facts in relation thereto, sufficiently to discharge his burden of proof in that respect. *Sutton v. Hotner*, 177 Iowa 620, 159 NW 222.

The fact that parties act jointly, or have a joint interest in a specific matter, is not sufficient to shift the burden of proof in establishing the agency; it still remains upon the party asserting the same. *Wallis v. Randall*, 81 NY 164.

But where an agency is once shown to have existed, the presumption exists that the agency continued to exist. In such case, the burden of proof is upon the person who claims the

termination of the agency with respect to a specific act or event. *Bergner v. Bergner*, 219 Pa 113, 67 Atl 999.

It is obviously improper for a person to state directly as his opinion that an agency did, or did not, exist at a stated time and place. This opinion is clearly a conclusion. The testimony should cover the surrounding facts and circumstances in detail, and leave it to the jury to decide whether they are sufficient to prove, or disprove, the existence of the alleged relationship. *Dagley v. National Cloak*, 224 Mo App 61, 22 SW(2d) 892.

The agent himself is a competent witness upon the question of the nature of the relationship. *Beckman v. Kittrell*, 80 Ark 228, 96 SW 988. Conversely, the admission of the principal is competent upon the question of the relationship existing at a specific time and occasion. *Freet v. American Supply Co.* 257 Ill 248, 100 NE 933.

The declarations of an alleged agent are not competent evidence in his favor as to the existence of the agency; such declarations may, however, be used against him to show matters adversely affecting his interests. *Sax v. Davis*, 71 Iowa 406, 32 NW 403; *Clark v. Payne*, 48 ND 911, 187 NW 817.

An exception to this broad rule is created in the case of a statement by an alleged agent as to the existence of the agency, made in the presence of the principal, and not denied by him. *Bacon v. Johnson*, 56 Mich 182, 22 NW 276.

Thus, it has been held that the fact of agency cannot be established by the unauthorized declarations or acts of a person, unless such declarations were known to, acquiesced in, or ratified by the principal. *Lakeside Press v. Campbell*, 39 Fla 523, 22 So 878.

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AGENCY OR EMPLOYMENT, STATEMENT OF DRIVER
AS TO, PROOF OF

Q—Where do you reside?

Q—How far is this address from the intersection of Jay Street and Avenue D in this city?

Q—Did you have occasion to be in the vicinity of this intersection on the 18th day of October, 1944? A—Yes.

Q—Did you see any part of an accident at this corner on the morning of that day between a Supreme Bakery truck and a parked sedan?

Q—Will you tell this court and jury, as near as you can now recall, what you saw of this accident? A—I saw a green truck going south on Jay Street run into the rear of a car parked on the westerly side of the street, etc.

Q—At what time of the day did this accident take place?

Q—Where were you at the time of the collision?

Q—How far is this from the point of impact of the two cars? A—About twenty feet.

Q—What, if anything, did you do after the accident? A—I ran over to the truck and helped lift the driver from his cab, etc.

Q—Who else was present at that time? A—The traffic officer at the intersection.

Q—What, if anything, did you hear the driver of the truck say when you approached him? A—He said it was tough luck this had to happen on his last delivery—

(Defendant's counsel: Objected to, as not binding on the defendant in this case.

Court: Overruled, it is admissible as part of the res gestae.)

Q—Describe the physical appearance of the driver when you first saw him.

(Statements by a person who is in such physical or mental condition as not to comprehend the nature of his remarks, are not admissible.)

Q—About how long a period of time would you say elapsed between the crash and the statement made by the driver? A—About ten seconds.

Q—What other statements did you hear the driver make?

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- Q—You heard the testimony of John Baker as to an accident on October 18th, 1944, at or near the intersection of Jay Street and Avenue D?
- Q—Will you please tell this court and jury what, if anything, you know about this accident? A—I was directing traffic at this intersection when I saw the truck come down Jay Street, etc.
- Q—About how far were you from the intersection when this collision happened?
- Q—What, if anything, did you do when you saw this accident? A—I ran over to the cars, and started to lift the driver out of the truck, etc.
- Q—About how long a period of time would you say elapsed between the time of the accident and when you reached the truck? A—About eight or ten seconds.
- Q—What, if anything, did you hear the driver of the truck say when you reached there? A—He said something about this happening on his last delivery.
- Q—Will you state the exact words, as near as you can now recall?
- Q—Describe the physical appearance of the driver when he made this statement.
- Q—About how long a period of time would you say elapsed from the time you reached the truck and the making of this statement? A—It was almost the same instant, not more than three seconds.
- Q—What other statements, if any, did you hear the driver make?
- Q—How soon after the first statement did the driver make the statement you have just described?

Where a uniformed messenger boy ran his bicycle into a pedestrian, and immediately thereafter stated to the injured person that he was delivering a message at the time of the accident, it was held that such statement was admissible in evidence as part of the *res gestae*. *Postal Teleg. Cable Co. v. Minderhout*, 14 Ala App 392, 71 So 89. The court stated here that the declaration by the messenger was "produced by, and instinctive upon," the specific occurrence to which it related.

In *Piedmont Operating Co. v. Cummings*, 149 SE 814 (Ga

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App) the court held admissible the statement of a hotel bell boy, made immediately after a collision involving a guest's car that he was driving, to the effect that he was acting under the orders of the chief bell hop, upon the theory that such statement was a part of the *res gestae*.

It is essential that the statement be made under such circumstances, and at such time, as to make logical the conclusion that it was spontaneous and therefore properly part of the *res gestae*. Thus, in one case it was held that the statement of a driver to a police officer, after his vehicle had become involved in an accident, was not properly admitted in evidence, as having been made too long after the accident.

"This statement can in no sense be regarded as *res gestae*. It was not a spontaneous utterance made at the time of the accident involved, explaining or throwing light upon it. It did not refer to the accident at all, but to matters entirely disconnected with it. It was not contemporary with the accident, but was a disassociated statement made to one who was not present thereat, at a time (whether 15 minutes or three hours) which was after the accident had become a past occurrence." *Renfro v. Central Coal & Coke Co.* 19 SW(2d) 766 (Mo App).

Some decisions exclude statements made by an employee or servant as to the existence of an agency relationship at the time of the accident, entirely apart from the doctrine of *res gestae*. Thus, in one instance, the statement of a driver, made immediately after an accident, to the effect that he was driving the car in the line of his duty as a private chauffeur, was held inadmissible, upon the theory that the "chauffeur could not bind or affect the defendant by his admissions or declarations made after the accident to third persons. His narrative of past events, no part of the accident itself, was pure hearsay." *Moore v. Rosenmond*, 238 NY 356, 144 NE 639.

In *Hackney v. Dudley*, 216 Ala 400, 113 So 401, the court stated that "an agent's declarations of any sort are not competent evidence against his principal unless made in the prosecution of the principal's business, within the scope of the agent's authority, and with reference to and explanatory of the act or transaction in question."

A statement by a foreman of a work gang, to the effect that the work was being performed for the defendant, was held in-

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admissible where made two days after the accident. *James Duff Construction Co. v. Alford*, 149 Ky 594, 149 SW 943.

Similarly, the exclusion from evidence of a statement by a chauffeur, made 40 minutes after an accident, at the time of the accident to the effect that he was performing a certain task, was upheld, upon the theory such statement was not part of the *res gestae*. *Dennes v. Jefferson Meat Market*, 228 Ky 164, 14 SW(2d) 408.

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AGENT'S DECLARATIONS, TO PROVE KNOWLEDGE BY PRINCIPAL OF DANGEROUS CONDITION

Q—Where do you reside?

Q—How long have you resided at this address?

Q—During that time have you had occasion to use Parnham Street, in the vicinity of Lee Avenue? A—Yes.

Q—Do you recall passing this vicinity during June, 1944?

Q—What, if anything, did you notice about the roadway in that vicinity? A—The pavement was cracked, etc.

Q—What did you do, if anything, with respect to notifying anyone of this defect? A—I told John Black, the Superintendent of Highways, of the crack and hole.

Q—When did you talk to Mr. Black?

Q—Please tell us, as near as you can recall, exactly what you told the Superintendent of Highways.

Q—What did the Superintendent reply to you at that time?

Statements or declarations of an agent are admissible against his principal, when the purpose of the testimony is to show knowledge on the part of the principal of the existence of certain facts or conditions, provided the fact of such knowledge is material to the issues involved. *Kindel v. Hall*, 8 Colo App 63, 44 Pac 781; *Tannahill v. Depositors Oil & Gas Co.* 110 Kan 254, 203 Pac 909.

The rule is stated as follows in the American Law Institute Restatement on Agency, vol 2, § 289:

“Statements of state of mind. Evidence of statements by an agent introduced in order to show the purpose for which he did an act or to show his knowledge or state of mind is admissible in favor of and against the principal under the rules relating to the introduction of evidence for this purpose. Statements by an agent are not excluded because made by an agent. If his knowledge or condition of mind or purpose is relevant to the cause of action which is being brought, either party may introduce evidence relevant to show this.”

Thus, in *Yazoo City v. Loggins*, 145 Miss 793, 110 So 833, it was held that the trial court properly admitted testimony concerning the statement of a city employee in charge of the maintenance of the streets, to the effect that he knew of the

existence of a certain street defect. This statement was admitted to show actual knowledge on the part of the municipality of the existence of the excavation or defect involved in the case.

In *Ahlson v. High Bridge Coal Co.* 180 Iowa 302, 163 NW 219, an action by a mine employee for personal injuries sustained when the roof of the mine collapsed, the trial court allowed proof of a statement by a representative of the mine owners to show knowledge on their part of the dangerous condition alleged to have contributed to the accident. The court stated in this case:

"We think the testimony was pertinent to the inquiry whether the delay in the timbering was justifiable or unjustifiable. Such evidence tends to show that the purpose of the timbermen was to take down a part of the roof at this point as soon as it became loose enough. They appreciated the possibility of its falling by the natural process of disintegration, but they deemed that as more likely to happen at night as a result of the shot-firing. We think the evidence had a clear tendency to show negligence in that they knowingly took chances of a falling roof which they could readily have avoided by the use of temporary timbers."

The statements must be made during the course of, and within the scope of, the agent's employment. *Shaw v. Potsdam*, 11 App Div 508, 42 NYS 779.

AGGRAVATION OF PRE-EXISTING CONDITION, PROOF OF

- Q—When was the first time you examined the plaintiff after June 14th, the date of this accident? A—On that same day.
- Q—State the results of your examination. A—I found the plaintiff suffering from a condition known as a split spine, or spina bifida.
- Q—Will you please describe the symptoms upon which you based your diagnosis?
- Q—I show you a series of X-ray plates, marked in evidence as plaintiffs' exhibits A to F, and ask you to examine the first of these plates, and point out the place where this injury appears.
- Q—Describe the nature of this condition. A—A split spine means the existence of a definite cleavage between the laminae, which is the covering of the spinal cord, etc.
- Q—Would you say, doctor, that this condition is partly or entirely congenital in origin? A—The lack of fusion is congenital in origin.
- Q—Is it possible for such a condition to exist without the presence of pain or disability? A—Yes.
- Q—Did you have occasion to treat the plaintiff for any illness or injury prior to the accident? A—Yes, I have been his family doctor for eleven years, and treated him quite frequently.
- Q—During that period of time have you had occasion to treat the plaintiff for any spinal condition or ailment? A—No.
- Q—Did the plaintiff at any time prior to this accident complain of pain in the back? A—No.
- Q—Will you please explain the significance of the term "congenital." A—It means a condition that a person has at birth.
- Q—Have you an opinion you can state with reasonable certainty, doctor, as to whether the condition from which the plaintiff is now suffering could have been caused by a sharp blow in the back? A—Yes.
- Q—Will you so state. A—Yes, such blow would be a competent producing cause.
- Q—What treatment did you prescribe for the injuries in this case?

Q—For how long a period of time did such treatment continue?

Q—Can you state with reasonable certainty, doctor, whether this condition, in its present form and with the characteristics of pain and suffering, will be permanent in nature?

It is well settled that a pre-existing defect or physical abnormality which is dormant, and becomes aroused or aggravated by an accident, thereby causing pain and disability, does not replace the accident as the proximate cause thereof. *Atlantic, etc. Co. v. Douglas*, 119 Ga 658, 46 SE 867.

The fact that a physical defect is congenital in character does not preclude a recovery for an aggravation thereof, causing pain and disability, where such aggravation is caused by the negligence of another. Many conditions lie dormant for long periods of time, causing no pain or even an awareness of their existence, until an accident causes the condition to spring to active life.

Thus, a case of mild chronic meningitis, with little or no disability, may become aroused to serious proportions by trauma to the region of the spine. Similarly, a sacroiliac condition of long standing, but causing no inconvenience, may only begin to pain and disable following an accident.

**ALTERATION NOT APPARENT UPON FACE OF INSTRUMENT,
BURDEN OF PROOF**

It seems to be well settled that the burden of proof as to alteration of an instrument, which is not apparent upon its face, rests upon the party who claims the existence of such change, and it devolves upon him to prove such claim by competent evidence. *Arnold v. Wood*, 127 Ark 234, 191 SW 960; *Craig v. National City Bank*, 26 Ga App 128, 105 SE 632; *Hessig-Ellis Drug Co. v. Todd-Baker Drug Co.* 161 Iowa 535, 143 NW 569.

This rule is based upon the theory that the burden of proof is upon the party who asserts the affirmative of an issue; if he alleges the existence of a specific fact or state of affairs, he must offer proof to sustain the truth of same. *Williamsburgh Sav. Bank v. Solon*, 136 NY 465, 32 NE 1058.

It was pointed out in the case last cited: "Where the alteration is visible on the face of the instrument, the paper discredits itself, and the holder should explain. But where the change simply makes the bond perfect in accordance with its own express terms and apparent purpose, there is nothing for the holder to explain. The burden falls on the adversary to prove an alteration such as will affect the instrument, and he must show the facts on which he relies. That is both the reasonable and the settled rule."

Thus, where the defendant sets up as a defense that certain notes forming the subject of the action have been altered with intent to defraud and deceive, the burden is upon him to establish the existence of facts from which such alteration can be inferred. *Wagler v. Robin*, 104 Kan 211, 178 Pac 751.

Similarly, in *Barker v. Stoppel*, 124 NY Supp 865, where the plaintiff claimed that a renewal clause in a lease was inserted through fraudulent methods, subsequent to execution of the lease, the court held that the burden of proof upon this point rested on the plaintiff, who must establish the allegations by a preponderance of the evidence.

This rule is inapplicable, however, in the case of an alteration that is plainly apparent upon the face of the instrument. In such instance it is clearly the duty of the person offering the note to make a satisfactory explanation of such alterations. *Ellison v. Mobile etc. R. Co.* 36 Miss 572.

In Case Threshing Machine Co. v. Peterson, 51 Kan 713, 33

Pac 470, an action involving an alteration in a note, it was stated as follows:

"It is said that the note bore no evidence of alteration upon its face, nor anything that would raise a suspicion that it had been changed since its execution. If that be true, the production of the note with the defendants' signatures attached would be prima facie evidence that the instrument in all its provisions was genuine; and, if the defendants relied upon the defense of material alteration, the burden would be shifted to them to establish the same. The indications of subsequent alterations may be so obvious and suspicious in some cases as to bring discredit upon the instrument, and require the party offering the same to account for the apparent changes. But, in the absence of suspicious circumstances, no presumption can be indulged against the genuineness of the instrument."

Similarly, in *Roettger v. Rothermel*, 251 SW 427 (Mo App) it was held no error for the trial court to have instructed the jury that the burden of proof was on the defendant as to the alteration of the contract alleged by him, and that such allegation must be established by a preponderance of the evidence. The court pointed out in this case:

"Where, as here, the signing of the written paper is admitted and the sole defense sought to be made is that the instrument was altered in a material manner after the signing thereof, but where there is nothing upon the face of the instrument itself to show any alteration, the burden of proving by a preponderance of the evidence the fact of such alleged material alteration of the instrument rests upon him who asserts it; for the rule with reference to such written instruments is that the law will presume the honesty or integrity thereof until there is something to indicate the contrary."

There is confusion in some of the decisions of discussing this point as to what constitutes the burden of proof; the intendment of many cases applying the rule is to refer to the burden of going forward with evidence in the first instance, as distinguished from the burden of proof which remains with the party asserting the issue throughout the trial. The distinction in this respect is well pointed out in *Farmers Loan & Trust Co. v. Siefke*, 144 NY 354, 39 NE 358, where the court expressed the rule as follows:

"The burden of proof upon the issue of a material alteration of a written instrument, sued upon in its existing condition, presents no anomaly, but is governed by the general rule that the party alleging that the instrument sued upon is the act and deed of the defendant must establish it by proof. There is confusion sometimes in treating of the burden of proof, arising out of inexact definitions. The burden is upon a plaintiff to establish his cause of action when it is in proper form denied by the other party. In actions upon a promissory note, this burden is, in the first instance, discharged by giving evidence tending to show that the note was signed by the defendant. Proof of signing also identifies and proves the seal when the action is upon a sealed instrument. This *prima facie* establishes the cause of action. But a defendant is not concluded. He may give evidence, under a general denial, to show that the signature is a forgery, or that the note had been materially altered by the plaintiff without his consent, or many other things which might be mentioned, showing that the plaintiff never had a cause of action. It is very common to say in such cases that the burden is upon the defendant to establish the fact relied upon. All that this can properly mean is that, when the plaintiff has established a *prima facie* case, the defendant is bound to controvert it by evidence, otherwise he will be cast in judgment. When such evidence is given, and the case, upon the whole evidence—that for and that against the fact asserted by the plaintiff—is submitted to court or jury, then the question of the burden of proof as to any fact, in its proper sense, arises, and rests upon the party upon whom it was at the outset, and is not shifted by the course of the trial, and the jury may be properly instructed that all material issues tendered by the plaintiff must be established by him by a preponderance of evidence."

AMBIGUITY IN WRITING, PROOF OF TRUE MEANING

In those instances where the phraseology in a written instrument is vague, ambiguous or indefinite, parol proof may be used to explain or clarify the meaning thereof. This evidence may assume any form, and come from any source, provided it is otherwise competent and directly bears upon or pertains to the question of clarification of the ambiguity. *Re Smith*, 254 NY 283, 172 NE 499; *Schwartz v. Whelan*, 295 Pa 425, 145 A 525; *Jensen v. Jensen's Estate*, 62 SD 496, 253 NW 619.

The rule is well stated in *Whittier v. Parmenter*, 90 Vt 16, 96 Atl 378, where the court held:

"Parol evidence of intention is not received in aid of construction to make a new contract. It is permissible only where the language is capable of two or more constructions either of which preserves the integrity of the written contract. Then, by the aid of extrinsic facts, the court may determine which interpretation should be given. Within these limits the writing is not altered or varied, but its language speaks the intention of the parties. But to carry the construction beyond that point, and give a meaning to the language used of which it is not fairly capable, though found to accord with the intention of the parties, would be to set aside the writing, and substitute another and different one. This is never permissible."

A distinction should be drawn between a latent and patent ambiguity. In the case of an ambiguity apparent on the face of the instrument, parol evidence is generally inadmissible to supply a substitute meaning to the phrase, upon the theory that such practice would require the insertion of new matter into the written instrument, which is contrary to the parol evidence rule. *Brandon v. Leddy*, 67 Cal 43, 7 Pac 33; *Day v. Asher*, 141 Ky 468, 132 SW 1035; *Fagan v. Falters*, 115 Wash 454, 197 Pac 635.

Thus, the phrase "home lot" in a deed, was held to constitute a patent ambiguity, rendering the instrument void. *Smith v. Brothers*, 86 Miss 241, 38 So 241.

Similarly, it has been held that failure to fill in a blank upon an instrument, which would supply the necessary meaning, creates a patent ambiguity that cannot be supplied by parol proof. *Vandevoort v. Dewey*, 42 Hun(NY) 68.

But it has also been held in this connection that parol proof is admissible to show the intent of the parties with respect to omission of writing upon a blank space. *Crisp v. Groves*, 73 F(2d) 327.

A latent ambiguity, or one that is not apparent upon the face of the instrument, may be explained by parol proof. *Harney v. Wirts*, 30 ND 292, 152 NW 803; *Fox Film Corp. v. Ogden*, 82 Utah 279, 17 P(2d) 294.

Thus, parol proof is admissible to show the true identity of a person mentioned in a contract, where the description given could fit two or more persons. *Bradley v. Rees*, 113 Ill 327, 55 Am Rep 422.

Parol proof may also be given to show that a specific term has acquired a meaning different from that implied from its ordinary use. Thus, it may be shown that a phrase in an insurance policy is subject to a technical interpretation, according to the usages of the insurance trade. *Halsey v. Adams*, 63 NJL 330, 43 Atl 708.

Similarly, it may be shown by parol proof that the phrase "Harbor of New York," has a particular meaning according to usages in the marine insurance field. *Petrie v. Phenix Ins. Co.* 132 NY 137, 30 NE 380.

While many decisions still cling to the conventional concept of "latent" and "patent" ambiguity, there is a tendency in many jurisdictions to disregard this strict distinction, and apply a more liberal rule in allowing parol proof to explain ambiguous phrases or parts of a document in writing. The tendency is more to the ascertainment of the real intentions of the parties, provided that the use of such extraneous proof does not operate to create any unfair advantage or perpetrate a fraud. Where the ambiguity partakes of the nature of both a latent and patent ambiguity, the decisions tend to allow parol evidence to explain the meaning of the parties. Similarly, where it is difficult to classify or define the nature of the ambiguity, courts will tend to the use of extraneous evidence to show the real intention. See *Abbott on Facts*, 5th Edition, p 223.

For application of the above rules to specific subjects, see appropriate sections.

ANCIENT DOCUMENT, PROOF OF

Ancient documents have been regarded as an exception to the general rule that all documents must be authenticated by the testimony of competent witnesses, before their use is proper as evidence.

According to many decisions, documents and writings of a wide variety which purport to be thirty years or more old, and produced from proper custody, and on their face free from suspicion, are admissible in evidence without the ordinary requirements respecting proof of execution or handwriting. *Applegate v. Lexington & C. County Min. Co.* 117 US 255, 29 L ed 892; *Beverly v. Burke*, 9 Ga 440, 54 Am Dec 351; *Fairchild v. Union Ferry Co.* 121 Misc 513, 201 NY Supp 295.

It is ordinarily necessary to produce in court proper evidence of the custody of the ancient document, as a prerequisite to its admissibility in evidence. An instrument is said to be in proper custody when it is in the place it would ordinarily be, and under the care of the person with whom it would logically be expected to repose. It is said that the fact an instrument comes from such custody tends to establish its genuineness. But proof of proper custody merely raises a presumption of genuineness; such presumption may be rebutted. *Gibson v. Poor*, 21 NH 440, 53 Am Dec 216.

Thus, it was stated in *Wright v. Hall*, 83 Ohio St 385, 94 NE 813:

"An ancient document is one which is not less than thirty years old, the time to be computed from the date of the execution of the instrument. In order to render it admissible as evidence, there must be, at least, some evidence accounting for its custody, and that it was produced from the proper custody; and there must be at least, some evidence of its antiquity, although it may purport to be ancient."

The question as to what constitutes proper custody depends upon the facts and circumstances of the particular case, considering the nature of the instrument, the purpose of its use as evidence, and the circumstances under which it was kept or found. *Chamberlain v. Showalter*, 5 Tex Civ App 226, 23 SW 1017.

In the case last cited the court pointed out in this connection:

"It is not strictly correct to say that an ancient instrument

proves itself. The presumptions that follow from the conditions that indicate its genuineness are allowed to take the place of the proof necessary at common law, and chief among these conditions has always been, and still is, the fact that it comes from a proper custody. To dispense with this requirement would be to push the rule beyond any known precedent, to throw down the last conservative barrier, and to allow every instrument regular upon its face and appearing to be over thirty years of age to be introduced without any evidence of its execution. We do not wish to be understood as saying that it is necessary for the evidence to trace step by step the custody of the instrument from its purported date; but that some fact or circumstance should appear to indicate that, when the instrument is presented to the court, it has come from the place or depository where it naturally would be found if genuine."

In *Smith v. Rankin*, 20 Ill 14, the court held it improper to admit in evidence two deeds, purporting to be over thirty years of age, produced by the party claiming thereunder, where no proof of proper custody was offered.

The court stated here:

"To say that the bare production of a deed by the party claiming under it, bearing date more than thirty years ago, is sufficient to raise a presumption of genuineness, and to admit it in evidence, would be opening a door to frauds which would unsettle all land titles at once. Great weight, formerly, with much propriety, was attached to the appearance of the document, denoting its real antiquity, but that has ceased to be entitled to any considerable consideration, for it is well known that modern chemistry will, in a single day, produce a paper having every appearance, both in texture and writing, of the greatest antiquity. And suppose it a forgery, who else should produce it but the forger who is to be benefited by it? Indeed, if a forged deed, we should expect to find it nowhere but in the hands of the forger, or else there might be some means of accounting for or detecting it. If the party is bound to show, by legitimate and competent proof, that the paper has been actually in existence the thirty years, there may be some security in the fact that the paper has not been got up for the immediate occasion."

The rule as to proof of proper custody is not an inflexible

requirement; courts have recognized several well-defined exceptions thereto. Thus, in *Goodwin v. Jack*, 62 Me 414, involving old historical records, the court held:

"Courts have felt obliged from necessity to depart from the strict rules of evidence in the admission of ancient writings, documents, books, and records, to prove the existence of the facts they recite. The rule of evidence requiring the testimony of the lawful custodian of books of record offered in evidence, that they are of the description claimed, before they are admissible, has repeatedly been relaxed in the case of ancient books of record of such proprietors of land. In such instances, such books have been held to prove themselves. When ancient books, purporting to be the records of such proprietary, contain obvious internal evidence of their own verity, and there is no evidence of the present existence of the proprietary or of any person representing it, or any clerk or other person authorized to keep the records, they are admissible in evidence without proof of the legal organization of the proprietary, or of its subsequent meetings.

In some instances the internal evidence of age, and other circumstances of authenticity, will be so strong as to render less essential detailed proof of proper custody, than in other instances. *Com. ex rel. Ferguson v. Ball*, 277 Pa 301, 121 Atl 191.

In this case the court held, in discussing the admissibility of a book that the "internal evidence of age and authenticity was so manifest that it might be said the book proved itself, without further identification, or evidence, that it came from proper custody. . . . A book having internal evidence of age and truth about it, like the one in question, speaks more for its genuineness than can custody."

"AND/OR," CONSTRUCTION OF PHRASE

Courts have been frequently called upon to interpret the phrase "and/or." This phrase has become increasingly common in legal documents, and is even found in Webster's New International Dictionary, where it is defined as meaning "either," "and," or "or."

A variety of interpretations have been placed upon this phrase. In *Schaffer v. City Bank Farmers Trust Co.* 239 App Div 531, 267 NY Supp 551, involving a power of attorney to "Pauline Schaffer and/or Walter Yankauer," it was stated as follows:

"The expression 'and/or' is one that has enjoyed increased usage during the past few years. It has been accepted to the extent that it now appears not only in written contracts but also in statutes. The interpretation to be afforded it, must depend in each instance upon the circumstances under which it is used, and it must be so construed as to express the true intention of the parties to the transaction. It is apparent here that the plaintiff intended to authorize Pauline M. Schaffer and Walter D. Yankauer and each of them to draw checks on the account. Their appointment was joint and several. Any other construction is strained and should not be indulged in. Both the conjunctive 'and' and the disjunctive 'or' are used, and effect should be given to each of them."

It was pointed out in *State v. Dudley*, 159 La 872, 106 So 364, in construing the phrase "and/or.:"

"When used in a contract, the intention is that the one word or the other may be taken accordingly as the one or the other will best effect the purpose of the parties as gathered from the contract taken as a whole. In other words, such an expression in a contract amounts in effect to a direction to those charged with construing the contract to give it such interpretation as will best accord with the equity of the situation, and for that purpose to use either 'and' or 'or,' and be held down to neither."

The court held in *Fisher v. Healy's Special Tours*, 16 NJ Misc R 113, 197 Atl 655, involving a complaint alleging that "Healey's Inc. and/or Healy's Special Tours" were owners of a vehicle:

"The evident object of framing the complaints in this way was to cover in one pleading the alternatives of one corpora-

tion, or the other, or both jointly, appearing on the proofs to be liable in damages. The practice of alternative pleading has been recognized in this state for over a quarter of a century. But the expression 'and/or,' while much in vogue of recent years in commercial circles and even in certain acts of the legislature, has never been accredited in this state as good pleading or proper to form part of a judgment record, and has been severely criticized by many courts of high standing. We concur in the disapproval of the expression by the courts of our sister states, and take this opportunity of registering that concurrence for the benefit of the bar. If the pleader is in doubt which of two parties is liable, or whether both are liable, it is simple enough to adopt the language of the statute and charge them 'jointly, severally or in the alternative,' as in effect he did say in the complaint, and not resort to a fractional form of expression which seems to have attained a certain vogue, temporary we hope, because of its bizarre character."

Probably the most critical view of this phrase was expressed in *Employers Mutual Liability Ins. Co. v. Tollefsen*, 219 Wis 434, 263 NW 376, where the court remarked:

"We are confronted with the task of first construing 'and/or,' that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of some one too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with view to furthering the interest of their clients."

SPECIFIC MATTERS

APPEARANCE OR CONDITION OF PLACE OR OBJECT

- Q—Where do you reside?
- Q—How far is this address from the Lee Avenue Bridge, where it crosses the Genesee River? A—About two miles.
- Q—Have you had occasion to use this bridge prior to June 30th, 1944? A—Yes.
- Q—Will you please state the circumstances under which you have used this bridge? A—I use it going to work and returning home.
- Q—About how often would you say you used the Lee Avenue Bridge during the past two years? A—About twelve to fifteen times each week.
- Q—Will you now tell this court and jury what, if anything, you noticed about the rails on this bridge? A—They were broken at the north end of the bridge.
- Q—For about how long a period did you observe this condition?
- Q—Describe the broken portion of the rail, as near as you can now recall.
(Ask the witness to describe its size, position, and general characteristics.)
- Q—I now show you a photograph and ask you recognize the scene therein shown? A—Yes, it is the north end of the bridge.
- Q—Are you able to state whether this photograph is a true and accurate reproduction of the north end of the bridge as you observed it? A—Yes, it is.
(Offered in evidence.)
- Q—Will you state whether, in your opinion, the rails shown on this picture were in a safe and usable condition at the time you saw them?
(Defendant's counsel: Objected to, as calling for a conclusion by the witness.
Court: Objection sustained. It is for the jury to decide whether the rails were safe or unsafe.)

It is proper for a lay witness to state his opinion as to the condition of an object or place, basing his opinion upon the observable facts. He should be shown to have sufficient opportunity for observation.

Thus, a witness may state how a road appeared to him, the condition of a broken bridge rail, the appearance of a motor vehicle, etc. He may describe a voice as soft, harsh or gruff (*Com. v. Hayes*, 138 Mass 185); whether a person looked excited (*State v. Johnson*, 60 ND 56, 232 NW 473), and generally state what he saw of a person, place or object. The opinion should, however, be free from conclusions which are properly the subject of consideration by the jury.

Where a witness has had experience in the use of a particular object and the subject is not one of general knowledge, he may state whether in his opinion such object was safe or unsafe at the time he observed same. *Rust v. Eckler*, 41 NY 488.

A lay witness has been held incompetent to testify as to whether a residence destroyed by fire was in a condition of "good repair," upon the theory that the observable fact should be stated and the jury left to infer whether a condition of good repair existed in view of such facts. *McMahon v. Dubuque*, 107 Iowa 62, 77 NW 517.

The question as to whether a specific condition or object is of a character requiring specialized knowledge is a preliminary matter for the court to decide in the light of all the surrounding facts and circumstances.

The question of the admissibility of evidence tending to show by comparison the fitness for use of a particular object, is discussed elsewhere. See "Comparison of Similar Articles, On Issue of Quality, Condition or Fitness."

**ATTORNEY AS WITNESS FOR CLIENT, PROPRIETY
OF PRACTICE**

The view is stated by the vast majority of decisions that while an attorney commits a breach of professional ethics when he testifies on behalf of a party as to any matters other than those of a formal character, without first withdrawing from the case, he is nevertheless competent to so testify. *French v. Hall*, 119 US 152, 30 L ed 375; *Hotaling v. Hotaling*, 187 Cal 695, 203 Pac 745; *Kaesser v. Bloomer*, 85 Conn 209, 82 Atl 112; *Pastorius v. Whidby*, 76 Fla 571, 80 So 513; *Holbrook v. Seagrave*, 228 Mass 26, 116 NE 889.

The prevailing rule in this respect is well stated in *Miller v. Urban*, 123 Conn 331, 195 Atl 193:

"When counsel becomes a witness in behalf of his client in the same cause on a material matter, not of a merely formal nature such as the attestation or custody of an instrument and the like, and not in an emergency to avoid defeat of the ends of justice but having knowledge that he would be required to be a witness in time to relinquish the case to other counsel, he violates a highly important rule of professional conduct. . . . However, the great weight of authority in this country holds that the impropriety of an attorney so testifying is a matter of professional etiquette and not one of strict law, and that the admission of testimony under such circumstances is not reversible error. Reliance has been placed, instead, upon 'the restraining influence of a professional education, and of the opinion of the bar and bench, and the liability to discipline for persistent misconduct, as competent to suppress evils of this character'."

The fact that there is no basic common-law restriction against an attorney testifying in behalf of his client, but that what prohibition exists stems largely from professional concepts, is stated by the United States Supreme Court in *French v. Hall*, *Ibid.*, as follows:

"The question for consideration is whether the court erred in its ruling in not permitting the examination of the plaintiff's attorney as a witness on the plaintiff's behalf. It appears from the bill of exceptions that no objection was made to the examination of the witness by the defendant; the refusal to allow him to be sworn seems to have emanated from the court sua sponte, on the ground that he was acting as an

attorney for the plaintiff in conducting the trial of the cause. There is nothing in the policy of the law, as there is no positive enactment, which hinders the attorney of a party prosecuting or defending in a civil action from testifying at the call of his client. In some cases it may be unseemly, especially if counsel is in a position to comment on his own testimony, and the practice, therefore, may very properly be discouraged; but there are cases, also, in which it may be quite important, if not necessary, that the testimony should be admitted to prevent injustice or to redress wrong."

In *Morgan v. Roberts*, 38 Ill 65, the court said that however "indecent it may be in practice for an attorney retained in a case and managing it, to be a witness also, we cannot say he is incompetent, and must leave him to his own convictions of what is right and proper under such circumstances."

The question of testimony rendered by an attorney was discussed in *Kintz v. Menz Lumber Co.* 47 Ind App 475, 94 NE 802, where the court regarded the conventional objections to such evidence as addressed more to the weight than competency; the court stating:

"An attorney at law is not incompetent to testify in a case in which he appears for one of the parties. The only objections which could be made to his evidence would go to its weight, not to its competency, and the weight which should be given to the testimony of the witness is to be determined by the court before whom the case is tried. While the practice of an attorney testifying for his client is not to be commended, and is often condemned, yet it sometimes becomes a matter of necessity for him to testify in a case in which he is engaged, and this may have been true in the action before us."

ATTORNEY-CLIENT PRIVILEGE, EXTENT OF PROHIBITION AGAINST DISCLOSURE OF COMMUNICATIONS

The broad rule is universally recognized that for the conventional prohibition against disclosure of transactions between attorney and client to apply, there must exist the element of secrecy, or stated differently, the transaction must be confidential in character. Hence where the client transacts his business with an attorney in the presence of a third person, the transaction is no longer regarded as confidential. *Laster v. Oldham*, 189 Ark 5, 69 SW(2d) 1078.

The broad rule is stated in *Elliott v. United States*, 23 App DC 456, as follows:

"Professional communications, made by client to attorney, or communications passing between client and attorney, are, upon principles of public policy, and from the necessity of preserving confidence in all matters of business where the assistance or agency of an attorney is required, held to be privileged from disclosure; and this privilege is that of the client rather than that of the attorney. This privilege embraces all communications made by the client to his attorney for and in the course of the business for which the attorney may be employed. The latter cannot be permitted to disclose such communications, whether they be in the form of title deeds, wills, documents, or other papers delivered or statements made to him, or of letters, entries, or statements, written or made by him in that capacity. The protection is not qualified by any reference to proceedings pending or in contemplation, nor is it material that the client be in no manner before the court where disclosure is sought to be had."

The exception created by disclosure of the transaction to an attorney in the presence of a third person, is stated in *Murphy v. Waterhouse*, 113 Cal 467, 45 Pac 866:

"When two persons address a lawyer as their common agent, their communications to the lawyer, so far as concerns strangers, will be privileged; but as to themselves they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations."

Where the confidential character of the communication is thus destroyed, it is held that the privilege of disclosure extends not only to the attorney, but to the heirs, devisees and

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legatees of the conferees, as well as their executors, administrators and assignees. *Sherman v. Scott* 27 Hun(NY) 331.

This rule has been applied to communications of a husband and a wife to an attorney employed by both with respect to matters of common interest. *Brogan v. Porter*, 145 Ky 587, 140 SW 1107.

Application of the rule has also been made in the case of a parent and child that consult the same attorney. *Piercy v. Piercy*, 18 Cal App 751, 124 Pac 561.

In this case, it appeared that a mother and son consulted an attorney with respect to execution of a deed, and it was held that since the matter concerned both persons, and each voluntarily made a disclosure of the transaction to the attorney in the presence of the other, the prohibition against disclosure of confidential communications did not apply.

But it has also been held that where two or more persons employ an attorney as their common counsel, their communications to him, in the presence of each other, are regarded as confidential, so far as strangers to the conference are concerned, and fully privileged as to them. *Lawless v. Schoenaker*, 147 Misc 626, 264 NY Supp 280.

SPECIFIC MATTERS

AUDIT, PROOF BY ACCOUNTANT

(Proving contents of voluminous books of account)

Q—What is your occupation? A—Certified public accountant.

Q—Did you examine the books of the Erie Railroad freight division office at Buffalo?

Q—When did you make this examination?

Q—And at whose request?

Q—What was the specific purpose of your examination? A—To trace a series of shipments from the Wilson Company in Buffalo, via the Erie Railroad during the past year, etc.

Q—Describe the books or records that you examined during the course of your search.

Q—About how many books would you say contained entries or notations relevant to the subject of your investigation? A—Over two hundred.

Q—And how many office records or files contained data relevant to this subject?

Q—About how long a period of time did you spend in this work?

Q—Now will you tell this court and jury the number of deliveries that you found were made the Erie Railroad by the Wilson Company during the month of January, 1944.
(Proving contents of books lost or destroyed.)

Q—What is your occupation? A—Certified public accountant.

Q—Did you have occasion to examine the books of the Wilson Store?

Q—When did you make this examination?

Q—And at whose request?

Q—During the course of your examination, did you examine the accounts receivable of the company?

Q—What other phases of the business of this concern did you go into during your examination?

Q—Who else was engaged in the examination of these records, at the same time, or immediately prior, to your own audit? A—My assistant, William Brown.

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Q—Now will you tell this court and jury whether you found a record of the following item in your examination, etc.?

(Defendant's counsel: I object to this question, as purely hearsay, it not appearing the witness personally saw the entry.

Court: I will accept the question, subject to connection.)

Q—Where did you find the item that you just described? A—In the summary sheets of my assistant.

Q—Did you personally examine the books to verify this transaction? A—No, my assistant did that.

(Defendant's counsel: I renew my objection.

Court: Sustained.)

The testimony of an accountant is not ordinarily admissible to show the contents of original records or books, except where the records or books are voluminous, or have been destroyed, or where for other reasons, it is impracticable to produce the originals in court. *Edelen v. Muir*, 163 Ky 685, 174 SW 474.

As stated in the case last cited, where it was held error to admit the testimony of an accountant as to contents of books he examined:

“One of the elementary rules which govern in the production of evidence is that which requires the best evidence of which the case, in its nature, is susceptible. That a book itself, ordinarily, is the best evidence of its contents, will be conceded. The foregoing rule has been relaxed where the book contains complicated or voluminous accounts or transactions, the examination of which could not conveniently take place in court. In such cases it is the practice to permit an accountant who has made an examination of the book to state the result of his computation therefrom.”

Records kept by a public auditor, as a part of his regular business routine, are generally admitted in evidence to establish or prove the contents of the original records, from which the auditor prepared his own reports. *Keller v. Harrison*, 139 Iowa 383, 116 NW 327; *William James Sons Co. v. Crouch*, 72 W Va 794, 79 SE 815.

A different rule prevails in the case of a private auditor, where courts have held that his audit, or testimony based thereupon, is inadmissible in evidence for the purpose of

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proving the original records, from which the audit was made. *Bartlett v. Wheeler*, 195 Ill 445, 63 NE 169.

Thus, in the case last cited, the court rejected an auditor's report, offered for the purpose of showing a shortage in the delivery of a commodity according to a contract, upon the theory that the original records of delivery constituted the best evidence. The court stated here:

"The appellants did not offer to prove by the books of accounts of Wheeler and plaintiffs that there was a shortage, but to show by the auditor of appellant that, from an examination of the books of account of Wheeler made by him, there appeared to be a shortage. Whether the books of account were competent or not, they were the best evidence; and the conclusion of the auditor from an examination of them was not, certainly, competent. It was not shown that the original reports of Wheeler and the credits allowed him were lost, or that they could not be produced. The offer was to show from an examination of the books of account of Wheeler and the plaintiffs not that he actually had on hand, but that he ought to have had on hand, a certain number of bushels of corn."

Similarly, in *Rouw v. Arts*, 294 SW 993 (Ark) it appeared that a certified public accountant sought to testify as to an audit of partnership books. The audit was made by other persons in the employ of the witness, and the latter sought to base his testimony upon the work sheets of his employees. This was held improper.

Where the books upon which an audit was based are available, it was held error in *Wilson v. Wilson*, 16 F(2d) 177, to admit in evidence the testimony of an auditor based upon his examination of the books, the latter not being offered in evidence.

In *Keller v. Harrison*, 139 Iowa 383, 116 NW 327, the field notes of a government survey, kept by the county auditor, were held admissible when properly certified by the auditor.

BAPTISMAL CERTIFICATE AS EVIDENCE OF AGE

While the general rule has been stated that church baptismal records are private records, and hence not self-proving (*Childress v. Catter*, 16 Mo 24), it is now well-settled that this class of documentary evidence is admissible where certain basic requirements respecting their authorship and custody are satisfied.

The rule is stated in *Kennedy v. Doyle*, 10 Allen(Mass) 161:

"In the case before us, the book was kept by the deceased priest in the usual course of his office, and was produced from the custody of his successor; the entry is in his own handwriting, and appears to have been made contemporaneously with the performance of the rite, long before any controversy had arisen, with no inducement to misstate, and no interest except to perform his official duty. The addition of a memorandum that he had been paid a fee for the ceremony could not have added anything to the competency, the credibility, or the weight, of the record as evidence of the fact. An entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger or notary, an attorney or solicitor, or a physician, in the course of his secular occupation."

A parish register was held admissible in *Hunt v. Supreme Council*, 64 Mich 671, 31 NW 576. The court summed up the rule as follows:

"There is no reason why the parish register should not be received and credited. The rule laid down in England, and followed until recent times, which recognized none but registers and similar records of churches of the established religion, has been abrogated there by statute, so as to open the door to many other records which all churches keep, and which are quite as likely to be accurate as those of an established church. Those registers serve a purpose equivalent to that served by family records. In this country they are fairly to be dealt with as equivalent to corporation records, which are generally evidence of such matters as are recorded in the usual course of affairs. There is not much authority on the subject here, but all the analogies and reasons which apply to other presumptively correct documents apply to these. There is no more reason to suppose these entries will be in-

correct or falsified than any other. Fraud is possible anywhere; but it cannot be presumed in records of churches any more than in any other documents preserved for similar purposes. The rejection of such proofs would be disastrous. They are relied on by the whole community."

It has been stated that the register or church record must speak only to that which it was the duty or business of the church official to record, and not of extraneous facts. *Houkton v. Manteuffel*, 51 Minn 185, 53 NW 541.

In *Baldwin v. Salgado*, 135 SW 608 (Tex Civ App), the court stated with respect to entries of age: "The proof in this instance was that it was the priest's duty under the regulation of the church to record the age, and that he obtained his information of such fact, at the time, from the parents or from the sponsors. There is nothing in the record offered, which shows that he obtained his information from the parents, who would know, and not from the sponsors who could not be supposed to know, the fact. With the record in this condition, the testimony is open to the suspicion that the fact may have been made known to the priest by the sponsors, and if so, it would indicate hearsay upon hearsay, and we are of opinion that the record was not admissible—at least, for this reason."

BELIEF OR STATE OF MIND

The belief held by a person at the time of performing a stated act, or the motives which prompted him, are properly the subject of direct opinion by such person, provided such testimony is competent and relevant to the issues presented. *Bayliss v. Cockcroft*, 81 NY 363; *Baldrige v. Cartrett*, 75 Tex 628, 13 SW 8.

Thus, upon the question whether the plaintiff was a passenger at the time of an accident upon a railroad train, it is proper to ask him questions designed to elicit his belief as to whether he had a right to ride upon the train. *Fitzgibbon v. Chicago & N. W. R. Co.* 119 Iowa 261, 93 NW 276.

Similarly, it has been held proper to question a person as to his belief in the truth of a charge which is later made the subject of an action for malicious prosecution. *McKown v. Hunter*, 30 NY 625.

It is proper upon cross-examination in such cases to elicit from the witness the basis of his belief, and what matters influenced him in arriving at that state of mind. Thus, where a witness gave as his belief that a person lived extravagantly, he may be asked on cross-examination to state the matters upon which he based that opinion. *Griffin v. Brown*, 2 Pick (Mass) 304.

The cross-examination may also extend to declarations made by the witness at a time subsequent to the formation of such belief, and inconsistent therewith. *Com. v. Moinehan*, 140 Mass 463, 5 NE 259.

It is improper to ask a witness what he judged to be the belief or state of mind of another person at a specific time. *Flora v. Mathwig*, 19 ND 4, 121 NW 63.

BIAS OR HOSTILITY OF WITNESS

The bias or prejudiced character of a witness may always be made the subject of cross-examination, for the purpose of affecting the credibility of the witness and the weight to be accorded his opinions. Under this category, any facts may be shown tending to show bias, or the true feeling of the witness toward another person, provided the animus concerns an issue in the case, or a party thereto. *Morgan v. Wood*, 24 Misc 739, 53 NY Supp 791.

Thus, it is proper to develop upon cross-examination of a witness that he previously made statements out of court tending to show his hostility to one of the parties to the action. *Haas v. Brown*, 21 Misc 434, 47 NY Supp 606.

Similarly, it is proper to show by third persons as witnesses that a witness for the adverse side had expressed opinions hostile to a party to the action. *Warren v. Pulitzer Pub. Co.* 336 Mo 184, 78 SW(2d) 404.

The evidence sought to be used for the purpose of showing bias should not be too remote in point of time from the main event, or the transaction forming the basis of the action. Precisely what constitutes remoteness precluding use of such evidence depends upon the facts and circumstances of each case. *Missouri, etc. R. Co. v. St. Clair*, 21 Tex Civ App 345, 51 SW 666.

It may also be shown as affecting the weight of the opinion expressed by the witness that he has an interest in the outcome of the suit, and would stand to gain by a verdict favorable to the side calling him as a witness.

It is within the discretion of the trial court whether evidence offered for the purpose of showing bias is cumulative, and irrelevant to the issues involved. *Collins v. McGuire*, 76 App Div 443, 78 NY Supp 527.

BLOODSTAINS, PROOF OF

Q—How far were you from the scene of this accident when you heard the crash?

Q—Did you thereafter proceed to the place where the cars were stationed upon the road?

Q—How soon after the crash did you reach this scene?

Q—Tell us what you saw at that time, with respect to the position of any bodies on the road.

Q—Did you notice any bloodstains upon the roadway?

(Defendant's counsel: Objected to, as the witness has not shown any special qualifications for the identification of bloodstains.

Court: Sustained, subject to further proof upon the witness' opportunity for observation, and ability to recognize bloodstains.)

Q—Had you ever witnessed the flowing of blood prior to this accident? A—Yes.

Q—Did you have the opportunity to observe bloodstains upon the ground prior to this occasion?

Q—Explain the circumstances.

Q—How far were you from the stains upon the ground in this case?

Q—Did they resemble any stains you had previously seen?

Q—Did you notice a body near any of these stains upon the ground?

Q—How large an area did they cover?

Q—What part of the road did the stains cover?

Courts have in some instances allowed a nonexpert witness to testify concerning the identification of blood or bloodstains. The admissibility of opinions in this respect depends largely upon the facts and circumstances of each case. Thus, it has generally been held that a nonexpert witness is more readily able to distinguish bloodstains from other colorations when the stain appears over a large area than when it is minute in character. *People v. Preston*, 341 Ill 407, 173 NE 383; *Johnson v. State*, 88 Neb 565, 130 NW 282.

It has also been held that a nonexpert witness may render an opinion as to the direction from which blood flowed, basing

his opinion upon the shape and general appearance of the stain. *Com. v. Sturtivant*, 117 Mass 122, 19 Am Rep 410.

A qualified expert may give his opinion as to the identification of a stain as blood; it has further been held in this connection that such an expert may testify as to the identification from mere observation of the stain. *Com. v. Sturtivant*, 117 Mass 122, 19 Am Rep 410; *Greenfield v. People*, 85 NY 75, 39 Am Rep 636.

The relative weight to be accorded testimony as to the presence of bloodstains depends, of course, upon the opportunity for observation on the part of the witness, his qualifications for the purpose of identifying bloodstains, and any other circumstances affecting the credibility of the belief expressed.

BLOOD TESTS, PROOF OF

Various blood tests have been devised to assist in the determination of questions of parentage of children. The most common is known as the Bernstein blood test, or the Landsteiner process. This test has been recognized by many courts, and is based upon the existence of four types of blood, each of which is hereditary according to present scientific thought on the subject.

The use of the Bernstein blood test will not definitely establish that A is the child of B, although it may furnish some evidence that A could not possibly be the child of B.

The rule respecting admissibility of blood tests was stated in *State v. Damm*, 266 NW 667 (ND) as follows:

"We recapitulate the views hereinbefore set forth by saying that we think (1) the reliability of the blood test is universally conceded by competent scientific authorities; (2) a trial court of record in this state has inherent power and authority in its reviewable discretion to order the taking of blood for such purposes in cases where paternity is an issue, and where in the opinion of the court the making and reporting of such test will be, or is likely to be, helpful in ascertaining the truth. We express no opinion at this time as to whether the courts may require a defendant in a criminal case to submit to a blood test, or to furnish blood for that purpose."

The court in *Re Swahn*, 285 NY Supp 234, considered the following statute:

"Wherever it shall be relevant to the prosecution or defense of an action, the court, by order, shall direct any party to the action and the child of any such party to submit to one or more blood-grouping tests, the specimens for the purpose to be collected by duly qualified physicians and under such restrictions and directions as to the court or judge shall seem proper. The order for such blood-grouping tests may also direct that the testimony of the persons so examined may be taken by deposition pursuant to this article."

It was held in that case that this statute indicated a legislative intent to make blood tests available in any class of litigation, in any court of the state, where its use is pertinent to the issues involved. "The sole limitation imposed by the legislature as to whether the test in question is to be permitted in any given action is that the result of such test be relevant

to the prosecution or defense. This obviously presupposed a certain degree of knowledge by the court to which the application is made, as to the object and effect of tests of this variety."

The court pointed out in *Re Swahn*, *Ibid*, that the law in this nation "is in an extremely primitive state as compared with the practice in European jurisdictions. . . . It is credibly asserted that blood-grouping tests are commonly accepted as admissible evidence on questions of paternity in the courts of Germany, Austria, Denmark, Sweden, Italy, Russia, Poland, Japan and England. Such use in continental European countries has apparently been widespread during the past decade, since over five thousand instances of its employment during the three years, between 1926 and 1929, have been collected."

It was held in one case that the verdict returned in a bastardy proceeding was against the weight of evidence where the uncontradicted testimony of the defendant's expert witness showed that the Landsteiner blood test established the impossibility of the defendant being the father of the child of the prosecutrix. *Com. v. Zammarelli*, 17 Pa D & C 229.

TRIAL GUIDE

BOOKS OF ACCOUNT, PROOF OF

a. Generally

- Q—Where are you employed? A—At the Queen City Lumber Company, the plaintiff in this case.
- Q—Were you employed there on the 17th day of March, 1944?
- Q—Describe your duties at that time. A—I was in charge of the shipping room.
- Q—Did you personally supervise the outgoing shipments of material? A—Yes.
- Q—What record, if any, did you keep with respect to shipments out of your department? A—A shipping record book, etc.
- Q—Does this book contain a record of each shipment that leaves your department?
- Q—I show you what purports to be a book of account for the month of March 1944, and ask if you recognize this book. A—Yes, it is the shipping records.
- Q—Can you point out in this book the shipments made on March 17th, 1944?
- Q—Do you recognize the handwriting in which these entries appear?
- Q—Describe the method by which you make entries in this book.
- Q—How long after a shipment leaves your department is an entry made of the order?
- Q—Do you personally witness the shipments leaving your department?
- Q—Do you have any independent recollection of this particular series of shipments on March 17th, 1944?

(Entries based upon hearsay evidence)

- Q—What is your occupation? A—Timekeeper at Plant No. 1 of the defendant.
- Q—Will you please describe your duties? A—Making up the timekeeping records for the payroll department, etc.
- Q—What records do you keep in that connection?
- Q—I show you what purports to be a timebook for the month of December 1944, and ask if you recognize this record? A—Yes, it is the book I made up for that month.

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Q—In whose handwriting are the entries?

Q—Upon what data or information did you base the entries in this book? A—The written report of the foreman of each department.

Q—Did you receive any information directly from the workmen themselves? A—No.

Q—Do these entries conform precisely to the reports that you received? A—Yes.

Q—How soon after you received the reports, did you make the entries?

(Offered in evidence as defendant's exhibit A.)

(Plaintiff's counsel: Objected to, as based upon the hearsay statements of third persons.

Court: Objection sustained. See text.)

Mere production of books of account is not sufficient to allow their admission in evidence, without proper identification or authentication. This requirement is ordinarily satisfied with testimony by the party who made the entries, affirming their authenticity, or by the oath of some person who knows the entries to be correct. *Muskogee Electric Traction Co. v. McIntire*, 37 Okla 684, 133 P 213; *Com. v. Grotzner*, 125 Pa Super Ct 305, 189 Atl 495.

Thus, it has been held sufficient that a clerk in the employ of the party keeping the books affirms the correctness of the entries, based upon the circumstances surrounding their making. *Blumer v. Mayer*, 223 Wis 540, 269 NW 693.

Where the entrant is available, he should ordinarily be called as a witness, or sufficient facts presented to explain his absence. *Radtke v. Taylor*, 105 Or 559, 210 P 863.

In those instances where the book entries are not made by one who has personal knowledge of the transaction, but are based upon memoranda or data furnished by others, some cases hold they are not admissible in evidence without verification by the person who furnished the data and who has personal knowledge of the transaction upon which the data is based. *Stanley v. Wilkerson*, 63 Ark 556, 39 SW 1043; *Bracken v. Dillon*, 64 Ga 243, 37 Am Rep 70; *New York v. Second Ave. R. Co.* 102 NY 572, 55 Am Rep 839.

As stated in *Chisholm v. Beaman Machine Co.* 160 Ill 101, 43 NE 796, with regard to proof of correctness of book entries:

"Where the clerk who makes the entries has no knowledge of their correctness, but makes them as the items are furnished by another, it is essential that the party furnishing the items should testify to their correctness, or that satisfactory proof thereof—such as the transactions are reasonably susceptible of—from other sources should be produced."

The rule is well stated in *Radtke v. Taylor*, *Ibid*, as follows:

"Personal knowledge on the part of the one who made the entry is, broadly speaking, essential. The entrant must generally know, of his own knowledge, the truth of the transaction which he enters. If the entrant made the entries upon reports of another who had personal knowledge of the transactions reported by him, then the entrant ought to be produced and required to testify that he made the entries correctly in conformity with the reports; and his testimony should be supplemented by the testimony of the one who made the reports, so that their combined testimony would be equivalent to the testimony of an entrant having personal knowledge.

"It is not necessary that the entrant, when testifying, shall at that time have an independent recollection of the transactions entered, but he must be able to say that at the time when he made the entries he had personal knowledge of the transactions, and that the entries were made correctly and in conformity with such knowledge.

"When the entrant appears as a witness, and testifies that at the time of making the entries he had knowledge of the transactions entered, and that he made the entries in accordance with the truth, there is not, in the final analysis, a total lack of evidence concerning the delivery of the goods sued for."

It was held in *Swan v. Thurman*, 112 Mich 416, 70 NW 1023, where a bookkeeper was the only person used to identify the book entries, that his testimony was insufficient standing alone, for the purpose of properly identifying the book of account, it appearing that he merely made the notations from slips handed to him by salesmen, and lacked personal knowledge of the sale and delivery of the articles described in the slips.

The court in this case laid down the following rule:

"It is sometimes proper to admit books of account as evidence of the acts of those who keep them, where the entries are contemporaneous with the acts recorded; but where the

book is, as in this case, the record of the acts of others, not within the personal knowledge of the bookkeeper, but made up from the statements of others, such book is hearsay. From the earliest cases, the admission of entries by third persons has proceeded upon the theory that such persons had personal knowledge of the fact stated in the entry."

Similarly, it was held in *Abele v. Falk*, 28 App Div 191, 50 NY Supp 876, that entries containing unverified statements of the plaintiff's employees, respecting time consumed for specific tasks, was incompetent for the purpose of establishing such factor, it appearing that no testimony was offered to establish the accuracy of the entries. As pointed out by the court:

"We think . . . that the plaintiff's books, admitted by the court as evidence of the amount of time spent and materials furnished, were incompetent. None of these books were properly proved. Those that were produced as time books of the plaintiff's employees to show the time that such employees spent upon this particular machine were not proved by the persons who made the entries. None of the workmen were called who worked on the machine, and no one testified to their accuracy who appeared to have had personal knowledge of the amount of time that was spent upon the machine. Other books were produced, being the books kept by the bookkeeper who testified that he made the entries in these books from other books and memoranda handed to him by the plaintiff's employees, which were not produced. These books were not books of original entry, and the only evidence of their accuracy was the evidence of the bookkeeper who made the entries, and who testified that they were correct entries. The accuracy of these books and memoranda was not satisfactorily established. These books thus kept by the plaintiff were introduced as evidence against the defendant to show the time that unnamed workmen had devoted to these machines. They were merely the unverified statements of the plaintiff's employees, the accuracy of which was not proved, and such statements were clearly incompetent evidence as against this defendant to prove that such unnamed individuals devoted any particular time to the completion of this contract between the plaintiff and the defendant."

A similar rule was stated in *Collins v. Carlin*, 106 App Div 204, 94 NY Supp 317, where the plaintiffs sought to secure

the admission in evidence of a time book made up from other data, none of which was substantiated by testimony as to their accuracy. "Under such conditions the rule requires not only testimony from the maker of the entries that they conform to the reports made by the timekeepers or the workers, but also testimony from the timekeepers or the workers, that their reports were true. When the maker of the entries can only testify that he acted upon information and wrote in accord with it, it must be shown that the information conformed to the facts."

In an action for work and material upon repairs performed for the defendant, it appeared that the workmen were required to enter upon blank forms the amount of work and material consumed during specific periods of time, such slips constituting the basis for daybook entries. It was held that the books of account made up upon the basis of such slips were admissible in evidence without extraneous evidence to support them. *Corkan v. Rutter*, 76 NJL 375, 69 Atl 954.

The reasoning of the court in arriving at this conclusion is expressed in the following summary of the rule applicable to such situations:

"We think it clear that if no slips at all had been used these books would be entirely competent under a system of workmen reporting orally to the bookkeeper the number of hours consumed and material used. Business could not go on unless the employer could rely on the statements of employees in such matters; and every book account in a business of any magnitude is necessarily made up in large measure of entries based on reports of employees. The system of making such reports in writing has the manifest advantages, among many, of keeping a check on the workmen, avoiding disputes between them and the employer by making a permanent record of the work, and facilitating the work of the office clerks. But we fail to see that the adoption of such a system requires the production and offer of the slips as imparting any competency to the books or limiting their availability as evidence. No doubt the existence of slips to support part of a book account and the absence of any to support the rest of it, all entries being under one system, might tend to impeach the value of the book account as evidence; but this goes to weight, and not to competency."

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b. Loose-Leaf Systems

- Q—Where are you employed, and in what capacity? A—Despatcher at the Scott-Williams Corporation.
- Q—Describe the nature of your duties. A—I give each truckman his daily deliveries, and I receive the receipted delivery slips when he returns at the end of the day.
- Q—Were you engaged in this work on March 13th, last? A—Yes.
- Q—I show you a slip, dated March 13th, 1944 and ask if you recognize it. A—Yes, it is one of our delivery slips.
- Q—Now I show you a batch of slips, and ask you to examine each of them, and tell us if you recognize them. A—All are delivery slips of our drivers.
- Q—Does your handwriting appear upon these slips? A—Yes, upon all of them.
- Q—Describe the character of the writings you personally placed upon these delivery slips. A—I put my O. K. and initials upon each before filing them away.
- Q—Now will you describe the system used for filing away these slips.
- Q—Who files the slips?
- Q—How soon after the truck arrives in the garage do you receive the delivery slip from the driver? A—Within a few minutes, not over ten minutes.
- Q—How soon thereafter do you place your initials upon the slip?
- Q—And is the slip then filed away?
- Q—Are you able to state to the best of your recollection whether the procedure you have just outlined was followed in the case of the slips you have just examined?
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The fact that a party's books of account are kept in loose-leaf form, or in card index files, will not necessarily operate to exclude same from use at the trial; provided it appears that the books contain original entries, and are contemporaneous with the transactions to which they relate. *Douglas v. Parker*, 28 Ark 47, 235 Pac 148; *Polus v. Conner*, 92 Ind App 465, 176 NE 234; *New York Motor Car Co. v. Greenfield*, 145 NY Supp 33.

The fact that loose-leaf systems or card indexes are more susceptible to fraud and deception is not regarded as sufficient to preclude their use as evidence. *Gus Dattilo Fruit Co. v. Louisville & N. R. Co.* 238 Ky 322, 37 SW(2d) 856.

In *Wylie v. Bushnell*, 277 Ill 484, 115 NE 618, it was pointed out in this connection that:

"No special form . . . of keeping books is required. The question of their competency and sufficiency must be determined by the appearance and character of the accounts, regard being had to the character of the work and the qualifications ordinarily required in keeping books of account as to such business. Separate scraps of paper have been admitted in evidence as books when sworn to as such. A notched stick has been held to be admissible as a book of original entries where the accuracy of the entries was satisfactorily tested by a comparison with an account made out from notched sticks some time previous. Sheets from a loose-leaf ledger system of accounts, containing the original entries, are, when properly identified, admissible in evidence. The material, form, or construction of the book offered in evidence as a book of original entries, is unimportant. The manner of keeping the accounts is the important consideration. If they are in such form and so preserved as to fairly show the true state of the accounts between the parties, and can, under the rules governing the making of such entries, be fairly held to be original entries, that is all that is required. To hold that they must be in bound book form in all cases is giving more importance to form than to substance. The vital question in such cases is whether the entries offered are the original charges, are true, and have been made at or about the time of the transaction."

Similarly, it was held in *Lewis v. England*, 14 Wyo 128, 82 Pac 869, that "the law prescribes no regular mode or method in which accounts must be kept in order to make them competent as evidence. The question of competency must be determined by the appearance and character of the book, regard being had to the degree of education of the party, the nature of his business, the manner of his charges against other people, and all other surrounding circumstances. 'The material, form, and construction' of the book offered in evidence as the book

of original entries are unimportant, provided such book be capable of perpetuating a record of events, and the entries are made in conformity with the general rules governing the admissibility of such entries."

But there is authority denying the admissibility of this type of evidence. Thus, in one case, it was held that charges for professional services rendered by a physician could not be properly proved by the introduction in evidence of loose-leaf cards upon which were kept a record of the services rendered. *Daniels Estate*, 29 Pa Dist R 131.

The rule denying the use of this class of evidence is stated in *Barber v. Bennett*, 58 Vt 476, 4 Atl 231:

"It would be extremely dangerous to allow whatever memoranda a party may have made in his lifetime upon loose pieces of paper to be used for the benefit of his estate, as evidence to prove the truth of the facts thereon stated. A memorandum is defined as a note to help the memory; and this paper, considered in connection with the circumstances under which it was found, partakes of that character. It certainly was not an account so kept and proved as to be admissible as evidence."

The prevailing view, however, is to admit loose-leaf records, when properly authenticated, and a proper foundation laid for their admission. Thus, loose-leaf ledger sheets have been admitted in evidence when shown by competent evidence to be part of a ledger which conforms to the broad rules of books of account kept in the regular course of business. *Crump v. Bank of Toccoa*, 41 Ga App 505, 153 SE 531; *Wylie v. Bushnell*, 277 Ill 484, 115 NE 618; *Ricker v. Davis*, 160 Iowa 37, 139 NW 1110.

In *Crump v. Bank of Toccoa*, *Ibid*, the court pointed out, in discussing the admissibility of ledger sheets:

"What was introduced was not really a book in the ordinary sense, but consisted of detachable sheets taken from a 'loose-leaf ledger,' and contained a record of the account between the parties. These documents, however, will be treated as a book, and, for convenience herein, will be called a book, since such leaves or sheets may be removed from the ledger containing them, and introduced in evidence upon the same footing and under the same principles as are applicable to the introduction of books of account, where the proper foundation of such

evidence is otherwise laid. It is immaterial whether the original entries of the account be made in a book or on separate sheets of paper, the requirement as to this matter being that the document shall comprise an account of the dealings between the parties, and shall be primary and original."

But some decisions refuse to allow loose-leaf ledger sheets to be admitted in evidence. *D. & L. Oil Station Co. v. Foltzer*, 105 NJL 391, 144 Atl 805.

The rule allowing proof of loose-leaf data has been applied to the following situations:

1. Time and material cards, sheets or tickets, kept in the regular course of business. *Wisconsin Steel Co. v. Maryland Steel Co.* 203 Fed 403; *Gow Mdg. Co. v. Marden*, 262 Mass 545, 160 NE 319.

2. Daybook leaves, slips or sheets, kept in a larger record or file. *Radtke v. Taylor*, 105 Or 559, 210 Pac 863.

3. Daily reports and statements, submitted and kept in the regular course of business. *Re Barrett Bros. Shipping Co.* 196 Ala 655, 72 So 259.

4. Scale and check sheets and tickets. *Hitt Lumber Co. v. McCormick*, 13 Ala App 453, 68 So 696.

5. Telephone call tickets. *Southwestern Teleg. & Teleph. Co. v. Pearson*, 137 SW 733 (Tex Civ App).

6. Charge or sales slips. *Powell v. Pickett*, 219 Ala 18, 121 So 23.

7. Invoices. *Rawleigh Co. v. Thompson*, 122 SC 43, 114 SE 702.

In *Graham v. Work*, 162 Iowa 383, 141 NW 428, the rule was stated as follows:

"The manner of keeping the accounts is the important consideration. If they are in such form and so preserved as to identity as to carry to the mind the conclusion that the true state of the accounts between the parties is therein shown from the original entries, to hold that they must be in bound book form is giving importance to form rather than to substance. The vital question in such cases is whether the entries offered are the original charges, are true, and proven to have been made at or near the time of the transaction."

Railroad freight waybills and transfer slips have been held admissible in evidence to show the volume of traffic over a

specific point. *Louisville Bridge Co. v. Louisville & N. R. Co.* 116 Ky 258, 75 SW 285. The court stated here:

“Objection is made as to the competency of these papers, on the idea that they were simply loose memoranda. This cannot be maintained. They were the original and best evidence of the transaction, and were the record kept by the railroad company to show its transactions. In cases of this sort the law does not demand impossibilities; it only demands the best evidence practicable; and no witness could carry in his mind these transactions. The only possible way to prove them is from the record kept at the time the transactions occurred.”

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c. Proving Loans or Payments

- Q—What is your occupation? A—Ledger clerk at the First National Bank.
- Q—Did you hold this position during the months of June and July of 1944?
- Q—Describe the nature of your duties. A—Maintaining the account sheets in the master ledger, from the letters A to D.
- Q—Who makes the entries upon the account sheets?
- Q—Upon what data or information do you base your entries?
- Q—I draw your attention to ledger sheets 690 to 694, and ask if you recognize them?
- Q—Are you able to identify these sheets as part of the ledger under your control during the above months?
- Q—Now can you state whether the entries upon these sheets were made during the course of your regular business as ledger clerk?

(or)

- Q—Can you state, of your own knowledge, whether the entries upon these sheets were made by you, or under your supervision, during the months of June and July last?

The rule appears to be well-settled that books of account are inadmissible for the purpose of showing the payment, or loan, of money; upon the general theory that the party making such loan or payment has it in his power in the first instance to secure adequate documentary proof of such fact. *Harrold v. Smith*, 107 Ga 849, 33 SE 640; *Nall v. Brennan*, 324 Mo 565, 23 SW(2d) 1053; *Stephens v. Cowen*, 30 Misc 835, 61 NY Supp 925.

The rule is well stated in *Smith v. Rentz*, 131 NY 169, 30 NE 56, as follows:

“The rule admitting account-books of a party in his own favor, in any case, was a departure from the ordinary rules of evidence. It was founded upon a supposed necessity, and was intended for cases of small traders who kept no clerks, and was confined to transactions in the ordinary course of buying and selling or the rendition of services. In these cases some protection against fraudulent entries is afforded in the pub-

licity which to a greater or less extent attends the manual transfer of tangible articles of property or the rendition of services, and the knowledge which third persons may have of the transactions to which the entries relate. But the same necessity does not exist in respect to cash transactions. They are usually evidenced by notes or writing or vouchers in the hands of the party paying or advancing the money. Moreover, entries of cash transactions could be fabricated with much greater safety, and with less chance of fraud being discovered, than entries of goods sold and delivered or of services rendered. It would be unwise to extend the operation of the rule admitting a party's books in evidence beyond its present limits, as would be the case, we think, if books containing cash dealings were held to be competent."

Similarly, in *Hodgson v. Harris*, 8 NJ Misc R 188, 149 Atl 830, it was ruled that in the absence of statutory provisions to the contrary, "the rule is very generally laid down that a party cannot prove by his own books of account by an entry therein the fact that he has paid out money, made in the regular course of business, of a loan to a party, or paid out money for his benefit. Books of account had their origin at a very early period in the necessity of things; but they are in derogation of one of the leading principles, to wit, that a party shall not be permitted to make evidence for himself. If they were proved to be books of original entry used by the party in the regular course of business, in which he made his daily entries of charge against all his customers, if they appeared to be fair on the face and not open to suspicion or impeached for correctness, they were allowed to go to the jury as prima facie evidence of the truth of the charges they contain."

A debtor's account book is accordingly held inadmissible for the purpose of showing that he paid a certain debt. *Gregory v. Jones*, 101 Mo App 270, 73 SW 899; *Jewett v. Winship*, 42 Vt 204.

The court in *Proctor v. Proctor*, 118 Ky 474, 81 SW 272, refused to allow a debtor to offer evidence of book entries made by the debtor of sums of money paid in discharge of his debt. It was pointed out by the court, in characterizing this type of proof:

"It was not the sale of merchandise, or the performance of services, or the use of the property hired and returned, or the

payment from time to time of money on deposit, but the payment of an outstanding debt, evidenced by a note in writing, a payment on which should be established, according to the usual course of dealing, either by a written receipt indorsed upon the note or taken upon a separate paper."

An exception has been created by some decisions in the case of books of account kept by a party in the regular and ordinary course of business, or in the instance of other account books containing items recorded during the process of long negotiations between the parties involved. *Rose v. King*, 170 Ark 209, 279 SW 373; *Culver v. Marks*, 122 Ind 554, 7 LRA 489; *Severy State Bank v. Gragg*, 98 Kan 318, 158 Pac 41.

Thus, in *Hartford Fire Ins. Co. v. Baker*, 257 Mich 651, 241 NW 871, the court allowed proof of an insurer's ledger sheets to show the indebtedness of the agent in an action against his surety.

In *Crump v. Bank of Toccoa*, 41 Ga App 505, 153 SE 531, the court stated, in discussing the books of a bank:

"That books so tendered in evidence are those of a banker and not of a merchant or tradesman, and relate to cash transactions rather than to the sale of goods or the performance of services, would not render the books inadmissible under the shopbook rule, although in other lines of business than banking, where a cash item is so large or unusual that a receipt or some written evidence would likely be required from the recipient by the other party, book evidence alone might be rejected as unsatisfactory. Since it is the custom of banks to deal mainly in cash transactions, the books used in such business may be admitted as evidence of such transactions, and in reference to all amounts alike, in the absence of other reason for excluding them."

d. Mutilation or Alteration, Effect of

A book of account must give the appearance of having been honestly kept and maintained; where the surrounding circumstances are such as to raise suspicion of the authenticity of the book of account, it is generally held that the book will be excluded from evidence. *Hopkins v. Osborne*, 278 Ky 229, 128 SW(2d) 575.

As stated in *Funk v. Ely*, 45 Pa 444: "When a book of original entries is offered in evidence, supported by the oath of

the party, the court examines it to see if it appears, *prima facie*, to be what it purports to be. If there are erasures and interlineations, and false or impossible dates, touching points that are material, or if for any reason it clearly appears not to be a legal book of entries, the court may reject it as incompetent. If this does not clearly appear, it is to be submitted to the jury to judge of, and that it is competent for the adverse party to show its general character by pointing to charges and entries affecting other parties, and by calling witnesses to prove such entries false and fraudulent."

The character of mutilation or alteration that will exclude a book of account from evidence depends upon the facts and circumstances of each case; and ordinarily presents a question for the court to decide.

In *Pratt v. White*, 132 Mass 477, it was pointed out in this connection that it is "for the court to decide upon the admissibility of the book offered, although the weight to be given to it afterwards must be largely a question for the jury, in connection with its appearance, the manner in which it is kept, and the other evidence in the case. It must appear to have been honestly kept, and not intentionally erased or altered, and to have been the record of the daily business of the party, made for the purpose of establishing a charge against another. Necessarily, regard is to be had to the education of the party, his methods and knowledge of business, etc. in deciding this question."

Similarly, it was held in *Churchman v. Smith*, 6 Whart(Pa) 146, 36 Am Dec 211:

"A book of entries, manifestly erased and altered in a material point, cannot be considered as entitled to go to the jury as a book of original entries, and ought to be rejected by the court, unless the plaintiff gives an explanation which does away with the presumption which must exist on its face. To allow such a book to go to a jury would subject this sort of evidence to the danger of great abuse and tempt dishonest men to commit frauds by altering books, so as to adapt them to circumstances; whereas such book should be a faithful record of transactions as they occur, and be pure and free from suspicion on its face, or, if altered, some explanation should be required."

The question whether the explanation offered for the muti-

lation or alteration is sufficient to overcome the adverse inferences resulting from the appearance of the book of account, depends upon the facts of each case. Where the proof in this respect fails to satisfactorily explain the mutilations, the court will exclude the book from evidence. *Hopkins v. Osborne*, 278 Ky 229, 128 SW(2d) 575.

Circumstances to be considered in this connection are the date of the mutilations, where such date appears from the record or can be reasonably inferred therefrom; the purpose for which the book of account is offered; whether the party against whom offered is available at the trial; custody of the book; and whether the mutilations are of such character as materially change any important entries. *Hopkins v. Osborne*, *Ibid*; *Cogswell v. Dolliver*, 2 Mass 217, 3 Am Dec 45; *Funk v. Ely*, 45 Pa 444.

e. Proving against Estate of Decedent

Books of account, properly authenticated, are generally held admissible in evidence for the purpose of establishing a claim against a deceased person. *Haines v. Christie*, 28 Colo 502, 66 Pac 883; *Dysart v. Furrow*, 90 Iowa 59, 57 NW 644; *West v. Van Tuyl*, 119 NY 620, 23 NE 450.

This rule prevails notwithstanding the entries were made by the claimant himself. *Re Runions*, 71 Misc 641, 130 NY Supp 1039.

Thus, in *Haines v. Christie*, *Ibid*, the court held inapplicable a local statute providing that no party to a proceeding, directly interested in the event thereof, could be allowed to testify therein of his motion and on his own behalf, when the adverse party defends as the heir of a deceased person. Accordingly, the court allowed in evidence books of account between a party to the proceeding and a deceased person, it appearing that a proper foundation had been laid therefor. The court stated:

"Such books were admissible at common law for the reason that when it appeared that they were made up, or contained entries made as a part of the ordinary and regular course of business, the ordinary motives for untruth would be removed, and that they therefore contained a true statement of the matters to which such entries refer."

Similarly, it was held in *Jeffords v. Muldrow*, 104 SC 388, 89 SE 357, that a merchant who had an account with a deceased person could prove that the items in his books of account were original entries made by him. This proof was held admissible, notwithstanding a statute prohibited disclosure of transactions with a person since deceased. It was pointed out in this case:

"The testimony offered by the plaintiff was preliminary in its nature, and was merely intended to lay the foundation for the introduction of the books in evidence, for the purpose of proving by the books, and not by the testimony of the defendant, the transaction between him and the intestate. The entry of the items of account by the defendant, in his books of original entry, was not the act of both parties to the transaction, but of the defendant alone; and from such act mutuality cannot be implied, as it was not something done by both parties in concert, nor in which both took some part."

There is, however, authority to the contrary, holding that books of account are not admissible, where the transaction involves a person since deceased, whose heir or representative is sought to be charged with liability on the basis of entries in such books of account. *Chandler v. Woodward*, 7 Penn(Del) 54, 76 Atl 623; *Leverett v. Wherry*, 4 Tex App 284, 15 SW 121.

The statutes relating to transactions with a deceased person have been variously construed by the courts, in cases involving entries in books of account, where the representative of a deceased person is sought to be charged on the basis of transactions with the deceased. The majority of the decisions hold that the interested party may personally identify the books of account and testify as to the meaning of entries therein. *Roche v. Ware*, 71 Cal 375, 60 Am Rep 539, 12 Pac 284; *Chapin v. Mitchell*, 44 Fla 225, 32 So 875; *Dysart v. Furrow*, 90 Iowa 59, 57 NW 644; *Bellows v. Bender*, 87 Misc 187, 149 NY Supp 548; *Keener v. Zartman*, 144 Pa 179, 22 Atl 889.

According to some decisions, the party in interest may identify his book of account, and testify that the entries therein were contemporaneous with the transaction to which they relate, but he may not testify to their correctness. *Stuart v. Lord*, 138 Cal 672, 72 Pac 142.

In *Smith v. Scott*, 51 Wash 330, 98 Pac 763, it was held that

while the books of account and entries therein could be identified, the party in interest could not volunteer explanations as to the method of keeping his books of account.

Where the proof in the case shows that the entries had been previously exhibited to the decedent, and that he approved same, there would appear to be no question as to the admissibility of the books, or any explanations as to the transactions they represent. *Britian v. Fender*, 116 Mo App 93, 92 SW 179.

f. Use in Issues between Third Parties

The broad rule prevails that books of account cannot properly be used in issues between third persons, where neither of such persons made entries in the books, or had any dealings therewith. *State Bank v. Brown*, 165 NY 216, 59 NE 1. Thus, it is held that entries appearing in the books of account of a bank are not admissible against the sureties of the cashier in an action on his bond, it appearing that the entries were not made by the cashier, but under circumstances which failed to identify the entrant, or establish that they were made in the usual course of business. *State Bank v. Brown*, 165 NY 216, 59 NE 1.

Where a party to the action makes entries in books of account that he keeps with a third person, they may be used against him on the theory that he has sanctioned these entries and made them his own. Annotation: 53 LRA 534.

Books of a third party are not admissible in an action upon a note, to establish the fact that certain indorsers on the note were partners. Annotation: 53 LRA 514.

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BUSINESS, COURSE OF, FAMILIARITY WITH, PROOF OF

(Cross-examination of witness in accident case)

Q—You state that the hole in the road was at least six inches deep, is that correct? A—Yes.

Q—And that it existed for at least six months before this accident? A—Yes.

Q—I show you a statement, dated August 17th, 1944, and ask you if you recognize the signature on the bottom of the page? A—Yes, it is mine.

Q—Do you recall the time you signed it?

Q—Read this statement aloud and tell this court and jury whether you still agree with what it says.

(After examining the paper, the witness denies he knew the nature of the contents, or states he was tricked into signing something read to him by another, or otherwise denies full awareness of the implications in the document.)

Q—Do you read English?

Q—In what business are you engaged? A—The jobbing of linens and sheetings.

Q—Do you have occasion to issue and receive bills of lading in connection with your business? A—Yes.

Q—You read these before signing?

Q—Do you make it a general practice in your business to read a paper before signing it?

Q—Would you sign a contract before reading its terms? A—No.

Q—Would you sign a lease before reading it? A—No.

Q—Yet you claim you signed this statement, given you by a stranger, without understanding its terms?

A basic presumption in law is that those persons who are engaged in a specific trade or business are presumed to know, and be generally acquainted with, the broad customs and usages of this business and matters connected therewith, as for example such facts as may reasonably be regarded as incident to the proper conduct of their business. *Union Ins. Co. v. American Fire Ins. Co.* 107 Cal 327, 40 Pac 431; *Lyon v. Culbertson*, 83 Ill 33, 25 Am Rep 349; *Stein v. Shapiro*, 145

Minn 60, 176 NW 54; Johns v. Jaycox, 67 Wash 403, 121 Pac 854.

Thus, it is generally presumed that where a promissory note, or bill of exchange, has been circulated and is thereafter found in the possession of the maker or drawer, that the money specified therein has been paid in the regular course of business. Dickens v. Heston, 53 Idaho 91, 21 P(2d) 905.

Another example of the presumption that a person is presumed to be familiar with the matters commonly associated with his trade or business, is seen in the holding that persons are presumed to have done what is in their interest to do, and that no one will be presumed to have knowingly surrendered or waived legal benefits to which he is entitled. Schwartz v. Whelan, 295 Pa 425, 145 Atl 525.

Application of the above presumptions has been made in a wide variety of cases. Thus, where a man in business voluntarily signs a statement pertaining to matters connected with his trade, he will be presumed to have read and fully understood the instrument to which he affixed his signature. It is further clear in this connection that even where the statement signed in no way pertains to the business in which he is engaged, he will be presumed to have read the statement, it being a basic precept in business not to sign without first reading and understanding the nature of the paper signed.

CARE EXERCISED, OPINION OF WITNESS

Q—Where were you standing at the time this accident happened?

Q—Will you tell this court and jury what, if anything, you saw of the accident?

Q—Did you observe the defendant's car as it drove up West Boulevard? A—Yes.

Q—Did you observe the plaintiff's car as it came in the opposite direction? A—Yes.

Q—Would you say the defendant's car was under control immediately before the collision?

(Defendant's counsel: Objected to, as calling for a conclusion upon a fact in issue.

Court: Sustained.)

Q—Now would you tell us whether in your opinion the plaintiff did all he could to avoid the accident?

(Defendant's counsel: Objected to, as calling for a conclusion upon a fact in issue.

Court: Sustained.)

The decisions are generally uniform in holding that direct testimony upon the issue of due care or negligence is inadmissible, as calling for a conclusion upon the matter at issue. *Hensen v. Connecticut*, 98 Conn 71, 118 Atl 464; *Stinson v. Payne*, 231 Mich 158, 203 NW 831.

Thus, it has been held that the inquiry: "Do you know whether or not they stopped as quickly as it could be done?" is inadmissible, as calling for a conclusion. *Marshall v. Taylor*, 168 Mo App 240, 153 SW 527. Similarly, the question "At this point of collision was there room for him to have passed, using ordinary care, on the north side?" was held improper. *Desmarchier v. Frost*, 91 Vt 138, 99 Atl 782. In another case, the question: "What made the car go into the bridge rail?" was ruled improper. *Nicktovich v. Olympic Motor Transit Co.* 150 Wash 278, 272 Pac 736.

"Was there any occasion for a signal at that time?" was held to call for a conclusion, thereby invading the province of the jury. *Anders v. Wallace*, 17 Ala App 154, 82 So 644. And the question: "Could that car have been stopped any quicker than it was by you at that time?" was held properly excluded in *Taylor v. Lewis*, 206 Ala 338, 89 So 581.

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According to some decisions, it is proper to ask a witness whether the driver of an automobile did everything possible to avoid an accident. Thus, in *Sommer v. Martin*, 55 Cal App 603, 204 Pac 33, it was held that the question:

"Was there anything you could have done that you did not do to avoid the accident?" was properly received over an objection. In another case, a passenger in a car involved in an accident was permitted to state as his opinion that the driver could have done nothing more than he did to avoid the collision. The court stated as follows:

"He was a man of good intelligence. There was evidence that he had been the owner of cars for some considerable period, and of several different types. He had testified in some detail as to the manner in which the car was handled by his driver, showing a familiarity with its operation. It cannot be said that his testimony would not aid the jury." *Reed v. Nashua Buick Co.* 147 Atl 898 (NH).

In *Merrihew v. Goodspeed*, 147 Atl 346 (Vt), the defendant was asked:

"Do you know of anything you could have done that you did not do to avoid hitting this child?" Upon appeal, this question was held proper, notwithstanding the contention it called for a conclusion, the court stating:

"The testimony was proper and material upon the defendant's theory of the case. It was not the expression of an opinion upon the question whether the proper degree of care had been exercised. It was not a matter of speculation, and it was material to know what the defendant did, and what, if anything, he left undone, regarding the management and operation of his automobile."

CAUSE OF INJURY OR DEATH, OPINION UPON

(Opinion based upon personal observation)

- Q—You are a registered physician and surgeon?
- Q—Did you have occasion to treat the plaintiff in this case?
- Q—When is the first time you saw the plaintiff?
- Q—Did you make an examination at that time?
- Q—Please state the results of such examination.
- Q—What history did you receive from the patient as to the cause of the injury? A—A heavy object fell from a building and struck him on the shoulder.
- Q—What treatments, if any, did you administer the plaintiff?
- Q—How long did such treatments continue?
- Q—Will you state the number of visits you made to the patient at his home?
- Q—And how often did you see him at the hospital?
- Q—Do you have an opinion you can state with reasonable certainty, doctor, as to the cause of the injury? A—Yes.
- Q—Will you so state. A—The fracture was caused by a heavy blow upon the right shoulder.

(Opinion of expert witness.)

- Q—Now, doctor, let us assume that a young man, thirty years of age, who had prior to November 16th, 1944 enjoyed good health, was walking along a public street when a building brick fell upon his right shoulder, throwing him to the ground, and causing a fracture of the right clavicle, accompanied by considerable displacement of the fragments, and that he was removed to a hospital and thereafter treated for the following injuries (recite in detail), and that thereafter the patient complained of the following disabilities in the right arm and shoulder area (describe fully); now assuming these facts, doctor, have you an opinion you can state with reasonable certainty as to the cause of the injuries to the right arm and shoulder? A—Yes.
- Q—Will you so state? A—I believe the injuries were caused by the fall of the brick upon the right shoulder, etc.

Courts have, in numerous instances, allowed a medical expert to state his opinion as to the cause of a death or personal

injury, provided the qualifications of such witness are established, and the subject matter is one that requires technical skill or knowledge for explanation or clarification. *Mobile L. Ins. Co. v. Walker*, 58 Ala 290; *Haskell v. Erickson*, 73 Ind App 657, 128 NE 466; *Horst v. Lewis*, 71 Neb 370, 103 NW 460; *Tracey v. Metropolitan Street R. Co.* 49 App Div 197, 63 NY Supp 242.

A wide variety of subjects have been regarded as properly explained as to causation by a competent medical witness. The following are illustrations of the application of this rule:

hemorrhage as caused by a rupture. *Clay County Cotton Co. v. Home Life Ins. Co.* 113 F(2d) 856.

miscarriage caused by a fall. *Chicago v. Didier*, 227 Ill 571, 81 NE 698.

electric shock as cause of death. *Haskell & B. Car Co. v. Erickson*, 73 Ind App 657, 128 NE 466.

pneumoconiosis caused by exposure to dust-laden atmosphere. *Golden v. Lerch Bros.* 203 Minn 211, 281 NW 249.

death caused by carbon monoxide poisoning. *Shaw v. National Handle Co.* 188 NC 222, 124 SE 325.

blow as cause of tuberculosis. *Blasband v. Philadelphia Rapid Transit Co.* 42 Pa Super Ct 325.

The broad rule was stated in *Smith v. State*, 43 Tex 643, as follows:

"On questions of science and skill, experts on the particular subject are permitted to give their opinions to the jury. The opinions of medical men are received in evidence as to the cause of disease or of death or of the consequences of wounds, and in some instances a jury would not be able to make a proper investigation without such evidence. For example, where a dead body has been found and identified, but, the cause of the death being unknown, this is attempted to be proved by circumstantial or presumptive evidence. In such a case physicians, examined as experts, may express their opinions as to the cause of the death, drawn from an examination of the body and from external appearances, as a basis for the inference that the death was caused by violence and was not the result of natural causes, as disease, sudden illness, or of accident. Evidence of this kind is admitted as necessary to aid the jury in coming to a correct conclusion in their verdict."

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The view is stressed in many decisions that the opinion of a medical expert as to the cause of an injury or death is admissible because it is the best evidence obtainable under the circumstances, and is the nearest approach to verity and accuracy that the facts of the case allow. *Jacksonville Electric Co. v. Cabbage*, 58 Fla 287, 51 So 139.

It is clear, of course, that the opinion must have a credible basis. The expert must base his estimate on facts that he knows personally, or as is more often the case, on a complete statement of the case and the facts furnished to him; he cannot conjecture or guess, as mere speculations are inadmissible. *Kanne v. Metropolitan L. Ins. Co.* 310 Ill App 524, 34 NE(2d) 732.

Thus, it was pointed out in *Hitchcock v. Burgett*, 38 Mich 501, that even in cases "where experts are called upon to give an opinion based upon their own personal observation or examination, the facts upon which the opinion is founded must all be stated; otherwise the witness might be giving an opinion which would have great weight with the jury upon a state of facts very different from those found by them in the case on trial. The value of the opinion, in other words, must depend very largely upon the facts on which it is based. And there is or may be, I suppose, such a thing as a difference of opinion amongst experts, arising upon the same state of facts. The facts, therefore, should always be stated, so that others may not only be able to determine the correctness of the opinion given, but that the jury may ultimately determine the truth or falsity of the facts stated, and thereby be enabled to give to the opinion the importance it is justly entitled to."

Where the witness has personally examined or attended the injured person, an opinion as to cause is more readily received and may carry more weight, than when the witness is merely an expert. *Clegg v. Metropolitan St. R. Co.* 1 App Div 207, 37 NY Supp 130.

The need for a hypothetical question is not apparent in the case of an expert who has familiarized himself with the facts of the case and the injuries sustained. *Langenfelder v. Thompson*, 20 A(2d) 491 (Md), where the court held:

"Where a medical expert is familiar with the facts of an accident and the nature of the injuries, he is competent to testify whether the injuries were caused by the accident, without

the necessity of having the facts in evidence recounted to him before he gives his opinion. It would be an idle and useless ceremony to require the evidence to be detailed in the form of a hypothetical question where the main facts are undisputed and the expert is entirely familiar with the facts. Furthermore, any details which the expert has personally observed can be elicited either on direct examination or on cross-examination, and these details can be associated with the other grounds for the general conclusion; and if it is discovered that any essential facts have been overlooked, the weight of his opinion will thereby be weakened or entirely destroyed. The opinion of an expert, the grounds upon which it has been formed, and the weight to be accorded to it are all matters for the consideration of the jury.

Some courts allow an expert witness to give an opinion based upon what other witnesses have stated, and as heard by such expert, assuming in the question that the testimony so heard was true. *Travelers Ins. Co. v. Thornton*, 119 Ga 455, 46 SE 678; *State v. Powell*, 7 NJL 244.

As pointed out in *Porter v. Hetherington*, 172 Mo App 502, 158 SW 469:

"Plaintiff now contends that the vice of defendant's questions as to his experts lies in the fact that they merely referred the expert to the evidence as a basis for his opinion, instead of reciting the assumed facts themselves so that the jury could see what the expert had as a basis for his opinion. It is true that, if the facts are controverted, it is improper to refer the expert to the testimony of the witness for the basis of his opinion because the jury have no way of knowing on what testimony or view of the evidence the expert is basing his opinion, and hence this gives them no opportunity to properly weigh and judge his testimony; and it puts the expert in the place of the jury, because, it leaves it to him to say what testimony is true. But where there is no dispute as to the fact of the collision and its character (as was the case here), it is not improper to refer the expert to the evidence given for plaintiff and her witnesses as a basis for his opinion." Expert opinions based upon what the witness has observed and heard from other witnesses are properly received. *Willard v. St. Paul City R. Co.* 116 Minn 183, 133 NW 465. But there is also authority for the view that under such circum-

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stances the proper procedure is to summarize the pertinent facts in the form of a hypothetical question. *McGuire v. Brooklyn Heights R. Co.* 30 App Div 227, 51 NY Supp 1075.

The view is also stated that an attending or examining physician may render an opinion as to cause of an injury or death where his opinion is based upon his observation and statements or complaints made by the injured person during the course of treatment and as a part thereof. *Crozier v. Minneapolis Street R. Co.* 106 Minn 77, 118 NW 256; *Matte-son v. New York C. R. Co.* 35 NY 487, 91 Am Dec 67.

Thus, it was held in *Southern Underwriters v. Blair*, 144 SW(2d) 641 (Tex Civ App):

"It is the generally recognized rule in this state that a physician who testifies as an expert must base his opinion upon certain things, some of which are his own knowledge obtained by physical examination and treatment of the patient, facts proved upon a trial and related to him in the form of hypothetical questions, and he may give his professional opinion, based upon both his own observations and evidence adduced at the trial. He may not base an opinion as an expert either in whole or in part upon subjective symptoms found, they being the things told him by the patient while being examined by a physician for the purpose of testifying as an expert witness. Such things are no less hearsay when they come from a doctor than if from a layman."

It is generally agreed that an opinion given in response to a hypothetical question, by a qualified witness, does not invade the province of the jury, and is properly received, notwithstanding the witness lacks personal knowledge derived from treatment or attendance upon the case. *Hull v. Detroit United R. Co.* 158 Mich 682, 123 NW 571; *Miller v. State*, 9 Okla Crim Rep 255, 131 Pac 717.

As pointed out in *Patterson v. Springfield Traction Co.* 178 Mo App 250, 163 SW 955:

"A medical expert may testify as an expert as to the cause of such injury or malady, based on hypothetical facts put in evidence by other witnesses. In testifying, both as an ordinary witness and as an expert, his credibility is a matter for the jury. The facts testified to by him may or may not be believed, and thereby be established to the satisfaction of the jury, just as with any other witness. His evidence as an ex-

pert is purely advisory, based on his superior knowledge, training, and experience, and is in the nature of an opinion based on facts assumed to be true only for the purpose of eliciting such opinion."

The technical character of the subject matter, and the inability of the jury as ordinary laymen to fully grasp the meaning of the injuries and the causative factors associated therewith, are viewed as sufficient justification for admitting an opinion directly upon the question of cause.

This view is well stated in *Cropper v. Titanium Pigment Co.* 47 F(2d) 1038, where it was stated: "But if the questions propounded were such that the jury might not be capable of determining from the evidence, then it was proper that they should have the benefit of the opinion of an expert, even though the opinion went to the matter directly in issue. The purpose of a trial is to investigate the facts so as to ascertain the truth, and the modern tendency is to regard it as more important to get to the truth of the matter than to quibble over distinctions which are in many cases impracticable, and a witness may be permitted to state a fact known to him because of his expert knowledge, even though his statement may involve a certain element of inference or may involve the ultimate fact to be determined by the jury."

Similarly, it was pointed out in *Donnelly v. St. Paul City R. Co.* 70 Minn 278, 73 NW 157, that the "line of cleavage between what does and what does not invade the province of the jury is not capable of definite location by any exact rule applicable to all cases, without regard to the subject of inquiry. The mere fact that the opinion called for covers the very issue which the jury will have to pass upon is not conclusive that it is not the proper subject of expert or opinion evidence. For example, sanity or insanity is the subject of expert testimony, although that may be the sole issue to be determined by the jury. It is well settled that the opinions of medical experts as to the cause of death are admissible, such opinions being founded either upon the personal knowledge of the facts of the case, or upon a statement of the nature of the injury or symptoms and nature of the disease as testified to by others. There can be no difference in principle between an opinion as to the cause of death and one as to the cause of physical ailments which have not resulted in death."

It is not sufficient that the witness believes the injury or death "might have been caused" by a specific event; his opinion must be based upon a reasonable degree of certainty. *Connor v. Philadelphia Rapid Transit Co.* 98 Pa Super Ct 250, where it was pointed out:

"We are not unmindful that our supreme court has said frequently in those cases where expert testimony is required to show the connection between an accident and the harmful results therefrom that it is not sufficient for doctors to testify that the ailment in question might have resulted from the assigned cause. The witness must state that in 'his professional opinion the result in question did come from the cause alleged,' or words equally as explicit."

There are some courts which refuse to allow an expert to directly state his opinion on cause of an injury or death; as for example, that a specific event did cause, or did not cause, an injury or death. The theory behind this view is that such testimony is a mere conclusion, and invades the province of the jury. *Roscoe v. Metropolitan Street R. Co.* 202 Mo 576, 101 SW 32; *Patterson v. Springfield Traction Co.* 178 Mo App 250, 163 SW 955.

The distinction is illustrated in the following summary from *Aetna L. Ins. Co. v. Bethel*, 140 Ky 609, 131 SW 523, where the court stated:

"It is permissible, in the examination of a witness introduced as an expert, to submit a hypothetical question, and ask his opinion thereon; or, if the witness has personal knowledge of the matter he is inquired of concerning, he may give his opinion based on such knowledge. But the question should not be put in such form as to make the answer the conclusion of the witness, instead of his opinion. It is the office of the expert to express an opinion, and the province of the jury to draw its own conclusions from the opinion so expressed. Here the witness not only expressed his opinion, but also drew from his own opinion a conclusion upon a question which was the very matter in issue. The facts upon which the opinion of the expert was desired should have been submitted to him in a question, and his answer should have been his opinion, and not his conclusion. The witness stated that the fall produced auto-intoxication, and this was the question the jury was called upon to decide. The witness should have been

asked if in his opinion a fall such as Dr. Bethel received would produce auto-intoxication; and should have confined his answer to an expression of opinion upon this question, in place of testifying that the auto-intoxication was the result of a fall."

It was also stated in *Langenfelder v. Thompson*, 20 A(2d) 491 (Md) that the opinion of an expert "as to the probability, or even the possibility, of the cause of a certain condition may frequently be of aid to the jury; for when the facts tend to show that an accident was the cause of the condition, the assurance of an expert that the causal connection is scientifically possible may be helpful in determining what are reasonable inferences to be drawn from the facts."

SPECIFIC MATTERS

CHARACTER OR REPUTATION

- Q—Where do you reside?
- Q—Do you know how far this address is from the home of the plaintiff, at 32 West Avenue?
- Q—How long have you lived in this community? A—For twelve years.
- Q—During that time have you had occasion to become acquainted with the plaintiff, William Lee? A—Yes.
- Q—State the basis of this acquaintance.
- Q—How long have you known the plaintiff?
- Q—And have you continuously resided in that community during such period of time?
- Q—Where do you maintain your place of business? A—About a mile from my home.
- Q—During the period of time that you have known the plaintiff, have you had occasion to meet people that also knew William Lee? A—Yes.
- Q—During that time have you heard any person speak about the plaintiff? A—Yes.
- Q—To what extent, under what circumstances, and how often, did you hear such remarks?
- Q—Do you ever recall hearing anything said about William Lee that reflected upon his honesty? A—No.
- Q—What would you say is the general reputation of the plaintiff as to his honesty, as you observed it in your community? A—Good.

It is well settled that evidence of reputation of a person is not admissible in a civil action for the purpose of showing good character, notwithstanding a criminal act is involved, unless it appears that the pleadings or evidence have made an issue of character, by alleging or showing circumstances tending to prove bad character. *Jones v. Layman*, 123 Ind 569, 24 NE 363; *People v. Hinksman*, 192 NY 421, 85 NE 676.

Where relevant to the issues, character may be proved by either of the following modes of proof:

1. *General Reputation:* Witnesses who are shown to be in a position to observe may testify as to the general reputation

of a person in his community, with reference to the specific trait of character involved in the case. Broad inquiries as to character generally are improper, except in actions for defamation. *Thibault v. Sessions*, 101 Mich 279, 59 NW 624; *Golder v. Lund*, 50 Neb 867, 70 NW 379.

Specific Instances: The broad rule is laid down by the vast majority of decisions that specific acts or instances furnish no guide to general reputation of a person in his community. *Lord v. Mobile*, 113 Ala 360, 21 So 366; *State v. McDonough*, 104 Iowa 6, 73 NW 357. Thus, it has been held that evidence of specific acts of adultery is improperly admitted to offset evidence of a party's reputation for being a peaceable character. *Com. v. Thomas*, 282 Pa 20, 127 Atl 427.

It is important to note that the witness may not state his own opinion as to reputation or character of a specific person in his community, but may testify only to what he believes to be the general reputation of such person as held by the entire community. *Sargent v. Wilson*, 59 NJ 396; *Bucklin v. State*, 29 Ohio 18.

In those instances where reputation is relevant, a witness may testify that he has heard nothing unfavorable said in the community about a specific person, or that he heard no mention of facts or opinions which would tend to show bad reputation. *State v. Baldanzo*, 106 NJL 498, 148 Atl 725.

CHECK STUBS AS EVIDENCE

Check stubs are not ordinarily admissible in evidence. *Carter v. Fischer*, 127 Ala 52, 28 So 376; *McWhorter v. Tyson*, 203 Ala 509, 83 So 330; *Simons v. Steele*, 82 App Div 202, 81 NY Supp 737; *Wells v. Hays*, 93 SC 168, 76 SE 195.

Thus, it was held in an action on an account, where the payment by check of a certain sum was admitted, that the memoranda made by the defendant on the stub of his checkbook, was inadmissible in evidence, it being no more than the defendant's secret declaration of the purpose for which the check was given, and in the nature of a self-serving declaration. *Carter v. Fischer*, *ibid*.

In commenting on the contention that entries in the stub of a checkbook are in the nature of entries in a book of account, made in the regular course of business, the court held in *Carter v. Fischer*, *ibid*:

"We are of the opinion that the stubs of the checkbook were not admissible in evidence for the following reasons: Neither the private checkbook as a whole, nor the stub part of it, is *prima facie* a 'shop-book' within the meaning of that word as used in reference to the rules of evidence. The stubs of a private and individual checkbook are only, at best, mere private memoranda of the owner and user of the book. This has been expressly held by this court."

Where it was sought to establish the stubs in a checkbook as competent evidence of loans to the defendant's testator, the court in *Simons v. Steele*, 82 App Div 202, 81 NY Supp 737, stated the rule as follows:

"It is conceded that the stub entries in the checkbooks were not admissible in evidence to show cash transactions, if they are to be treated as books of account. Such is the effect of the decisions. The plaintiff claims, while admitting this rule, that they were admissible as a part of the *res gestae*, and as constituting the best evidence procurable. If admissible for the purpose of showing that the parties had transactions, and for nothing else, they would be insufficient to establish an indebtedness, and resort could not be had to them for the purpose; consequently, if admissible to this limited extent, the plaintiff would not be aided, because they did not establish the indebtedness, and were not competent for such purpose. It can scarcely be claimed with any show of reason that be-

cause no other evidence was procurable, that therefore they may be resorted to, to establish an indebtedness. Lack of evidence may be the plaintiff's misfortune but it does not avail as a basis upon which to found a claim. That must be proved by competent testimony."

Check stubs may, however, be used to refresh the memory of a witness. *Riordan v. Guggerty*, 74 Iowa 688, 39 NW 107; *Third National Bank v. Owen*, 101 Mo 558, 14 SW 632.

According to some decisions, stubs in a checkbook may be admissible as notations made in a book of original business entries, kept in the usual course of business, provided the basic requirements for that class of evidence are satisfied. *Rose v. King*, 170 Ark 209, 279 SW 373.

The facts in the case may be such, as where the precise relationship between the checks issued and the stub entries are fully established, that proof of the entries on the stubs will merely supplement evidence already properly admitted, and hence may be received, provided the checks are already in evidence. *Royce v. Farmers L. Ins. Co.* 107 Kan 245, 191 P 581.

COMPARISON OF SIMILAR ARTICLES, ON ISSUE OF QUALITY, CONDITION OR FITNESS

Q—Where do you reside?

Q—Are you the owner of this property? A—I am.

Q—Did you, on or about June 28th, 1944, purchase a quantity of paint from the Eureka Paint Company? A—Yes.

Q—I show you a can of paint, marked plaintiff's exhibit A, and ask if you recognize the label on this can. A—It is the same as the paint I purchased.

Q—Did you personally inspect any of the paint that you purchased? A—Yes.

Q—Was the paint used upon any part of your property? A—Yes, the roof.

Q—Who applied the paint? A—Two of my workmen assisted me in applying it.

Q—Were you present during the application of this paint?

Q—Would you be able to recognize the color and consistency of this paint? A—Yes.

Q—I ask you to examine the contents of plaintiff's exhibit A, and tell us whether you recognize any similarity between it and the paint you applied on your roof?

Q—What is there about this paint that makes you think it is similar to the paint you purchased?

(The proof should explore all aspects of similarity in the objects involved.)

Q—When was the paint that you purchased applied on the roof?

Q—Did you observe the results that followed this application?

Q—Describe these results, as near as you can recall. A—it caused the shingles to shrivel, etc.

(Questions adapted from *Union Paint Co. v. Dean*, 48 RI 288, 137 Atl 469, where the court allowed proof of similar results following application of a similar product.)

Q—What is your occupation? A—Farmer.

Q—Did you, on or about January 4th, 1944, purchase a silo from Brown & Co. the defendants in this case? A—Yes.

Q—Who was present at the time you made this purchase?

A—Mr. Brown and John Gale, the plaintiff in this case.

Q—Describe the silo you bought at that time.

Q—Did you observe whether the plaintiff bought a silo while you were there? A—Yes, he did.

Q—Did you notice the particular silo he purchased? A—Yes.

Q—Describe this silo as near as you can recall.

Q—In what respects, if any, would you say your silo differed from that purchased by the plaintiff? A—None, they looked identical to me.

(The proof should show in detail the opportunities for observation that the witness had when the comparison was made.)

Q—For how long a period did you use this silo?

Q—Describe the results following such use.

(The fact that the results following such use were the same in both instances may be shown where the requirements of similarity are satisfied. See *McNamara v. Ross*, 225 Mich 335, 196 NW 336.)

The rule is generally stated that the capacity, efficiency or excellence of an article may be shown by evidence comparing it with a similar article, where the conditions respecting use, place, and other basic circumstances are not too dissimilar. The precise line of demarcation in this respect is obviously not susceptible of a general rule or formulae, but depends upon the facts and circumstances of each case. *Katz v. Delohery Hat Co.* 97 Conn 665, 118 Atl 88; *Barnett v. Hagan*, 18 Idaho 104, 108 Pac 743; *Glaeser v. Hoeffner*, 68 Mo App 158.

Thus, in one case it was held that the manufacturer of a safe may show its fireproof character upon a specific occasion and with relation to a specific safe by proof that similar safes made by the same manufacturer were turned out in accordance with a common plan and design, and had passed through fires with their contents unharmed. *Barnett v. Hagan*, *ibid*.

Similarly, it has been held that the quality of textiles may be shown by testimony that the seller had previously sold goods of the same character to other customers, engaged in the same line of work as the purchaser in the case at issue, and received no complaints. *Steil v. Holland*, 3 F(2d) 776.

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In *Baer Grocer Co. v. Barber Mill. Co.* 223 Fed 969, the purchaser of flour claimed that the product sold by the seller was below usable quality, due to the lowering of standards by the seller and the employment of a new miller; the court admitted, in rebuttal of this proof, evidence by the seller that during the period involved thousands of barrels of the same flour had been sold to other customers, without complaint.

Where the purchaser of a quantity of sausages claimed spoilage of the product, it was held permissible for the seller to show that the sausages claimed to be spoiled were part of a larger lot, all made at the same time, and that the balance of this lot was unspoiled. *Luetgert v. Volker*, 153 Ill 385, 39 NE 113.

The fitness for use of a stoker, with regard to a specific type of coal, may be shown by proof that in the hands of other users the same type of stoker performed successfully with the same character of coal. *Savery Hotel Co. v. Under-Feed Stoker Co.* 178 Fed 806.

The same rule was applied to a ditching machine warranted to perform certain tasks in stated soils, the court holding: "The weight of such evidence would greatly depend upon the difference in the soil and the other surroundings of the two places. Such a machine might perform well in one character of soil, and yet would fail in another and different character of soil. Evidence ought not to be excluded because it is entitled to but little consideration and weight." *Baber v. Rickart*, 52 Ind 594.

There is ample authority denying the admissibility of evidence of comparison of similar articles in evaluating fitness for use, or compliance with a warranty, of a specific article. *Vann v. McCord*, 22 Ala App 241, 114 So 418; *Watson v. Bigelow*, 77 Conn 124, 58 Atl 741; *Brown v. La Grasso*, 203 App Div 50, 196 NY Supp 349.

Thus, it has been held that the seller of shoes, claimed to be defective, could not show their good quality by proof that other merchants had used the same shoes in their trade without complaints. *Hill v. Hanan & Son*, 62 Tex Civ App 191, 131 SW 245.

The court held that it was not possible to show similarity of conditions under the circumstances of the case, and pointed out:

"Experiments, comparisons, other instances, and occurrences are at best very unsatisfactory evidence, and before the same are admitted it should be made to appear that the conditions or circumstances were identical, or at least so similar as that the proposed evidence will reasonably tend to establish the truth as to the subject of inquiry."

Upon the same reasoning the court in *Petrolia Supply Co. v. Hemphill*, 258 SW 861 (Tex Civ App) held that the seller of barrels could not show fitness for use by proof that other users of the same type barrel found the article satisfactory. Similarly, the maker of cigars alleged to be unfit for use was held improperly allowed to show that about the same time as he sold the cigars in question he sold cigars from the same lot to other purchasers who found the same satisfactory. *Barton v. Kane*, 17 Wis 38, 84 Am Dec 728.

In a case involving the fitness of flour for use in making bread, the court denied the relevancy of the seller's proof that other users of the same flour found same in good condition and fit for the making of bread, and pointed out: "Why should the taste of one man not concerned in a controversy before the court be forced upon an unwilling party whose taste was different? Besides, who was able to say that the grade of flour in each case was the same." *Kauffman Mill. Co. v. Stuckey*, 37 SC 7, 16 SE 192.

But where the conditions respecting manufacture, use, and care of the article are so similar as to make reasonable the presumption that what happened in one case should have occurred in the other, the courts are fairly uniform in allowing admission of evidence of the character under discussion. Thus, the purchaser of a silo may show, in support of his contention that the machine has rusted due to unfitness for use, that the same type silo was sold to other users in the same neighborhood, and had rusted. *McNamara v. Ross*, 225 Mich 335, 196 NW 336, where the court stated: "The proofs showed that the other silos were of like material. Upon the issue whether the silo was rust proof, evidence was received as to the condition of the other silos. We do not think this was error, inasmuch as the other silos were shown to be of the same material, and existing under like conditions. . . . If the other silos were of the same material, and they rusted, it

would certainly be some evidence that the one in question would, and did, rust, as claimed by plaintiff."

The purchaser of paint, alleged to be defective and unfit for the use represented, was held properly allowed to prove that the same paint sold to, and used by, other purchasers in the same neighborhood, was unfit for the painting of roofs and had actually spoiled roofs to which it was applied. *Union Paint & Varnish Co. v. Dean*, 48 RI 288, 137 Atl 469.

In *Lyon v. Martin*, 31 Kan 411, 2 Pac 790, involving fitness for use of a harvester, the court allowed proof of the design and mechanics of similar machines intended for similar work, and stated: "If it failed to do such work, was it, or was it not, properly handled? Perhaps, for the purpose of tending to show that it was properly handled, testimony was admissible that other like machines, in the hands of parties familiar with farm machinery, also failed to do the work warranted. Of course, this latter testimony is a little remote, but we think it was competent as tending to sustain any direct testimony of defendants as to the manner in which this one was managed and handled."

CONSTRUCTION OR OPERATION, OPINION UPON

- Q—What is your occupation? A—Mechanical engineer.
- Q—In what phase of mechanical engineering have you specialized, if any? A—In gasoline engines.
- Q—Are you generally familiar with the construction and operation of such engines?
- Q—How long have you been engaged in this work, and at what places?
- Q—Of what institutions are you a graduate?
- Q—Did you have occasion to examine a gasoline engine at the Parker Factory on Main Street?
- Q—When did you make this examination, and at whose request was it made?
- Q—Will you please describe the engine you examined at that time?
- Q—Previously to examining this machine, had you looked at similar engines?
- Q—Are you generally familiar with the construction of that type gasoline engine?
- Q—Please state the results of your examination.
- Q—Do you have an opinion you can express with reasonable certainty as to the construction of the machine? A—Yes.
- Q—Will you so state? A—I think it was improperly constructed.
- Q—Now will you please tell this court and jury the basis for your opinion in that respect.
- Q—Did you observe the purpose for which this machine was being used?
- Q—Was this engine safe for the purpose for which it was being used at that time? A—No.
- Q—Please state in what respects the engine was unsafe.
-

An expert witness, properly qualified, may express an opinion as to the proper method for construction of a particular device or structure, so as to insure adequate safety to those making use of same. *Colorado Midland R. Co. v. O'Brien*, 16 Colo 219, 27 Pac 701.

Thus, it has been held proper for an expert witness to state

his opinion as to the proper method for laying a railroad track. *Colorado Midland R. Co. v. O'Brien*, *ibid.* Similarly, he may state the proper construction of such specialized tools as ice tongs. *Conrad v. Ithaca*, 16 NY 158. A properly qualified witness may also render an opinion as to the proper and safe method for construction of a sewer. *Chicago v. Seben*, 165 Ill 371, 46 NE 244.

A witness shown to be familiar with the subject matter may state the cost of performing certain construction work improvements. *Le Brun v. Richards*, 210 Cal 308, 291 Pac 825. It has, for example, been held proper for a witness qualified as a contractor to state what it would cost to install a sprinkler system in a building. *Hammaker v. Schleigh*, 157 Md 652, 147 Atl 790.

It is proper for an expert witness to state whether a particular machine or device was safe or faulty for the specific purpose for which it was constructed, and he may also give the details forming the basis for such opinion. *Bier v. Standard Mfg. Co.* 130 Pa 446, 18 Atl 637. He may also state whether in his opinion a certain device was the best or most efficient of its kind procurable upon the market. *Scattergood v. Wood*, 79 NY 263, 35 Am Rep 515.

CONTINUANCE OF CONDITION OR FACT, PRESUMPTION OF

It is a well-settled presumption of law that where the existence of a person, or state of things, is once established by satisfactory proof, that the law presumes the same continues to exist, in the absence of proof to the contrary. *White v. White*, 82 Cal 427, 23 P 276; *Quaker Realty Co. v. Stark*, 136 La 28, 66 So 386; *Re Huss*, 126 NY 537, 27 NE 784.

The application of this presumption to any given state of facts is a matter within the sound discretion of the trial court, to be decided in the light of the facts and circumstances of each case, and according to the rules of relevancy generally applicable. *Yankton Nat. Bank v. Benson*, 33 SD 399, 146 NW 582.

Thus, once a person has established his citizenship in a particular country, it is presumed that such citizenship has continued. *Hamilton v. Erie R. Co.* 219 NY 343, 114 NE 399.

Similarly, an agency relationship is presumed to have continued, following competent proof of its existence at a specific date. *Hall v. Union Central L. Ins. Co.* 23 Wash 610, 63 Pac 505. It is also clear that title to a specific asset is presumed to continue, in the absence of facts to the contrary. *Vidmer v. Lloyd*, 193 Ala 386, 69 So 480.

The nature and content of a foreign law, proven to have existed at a certain date, is presumed to have continued to follow that form. *Re Huss*, 126 NY 537, 27 NE 784.

The law will not ordinarily presume the continuance of a wrong. *Schlitz Brewing Co. v. Compton*, 142 Ill 511, 32 NE 693.

Where a person enters the service of another for a definite and stated period of time, and continues in such employment after the expiration of such period without making a new contract or in any manner varying the old agreement, it has been held that the law will presume the old relationship continued, in all its terms and conditions. *Stewart Dry Goods Co. v. Hutchison*, 177 Ky 757, 198 SW 17.

A person shown to have been of sound mind at a certain time will be presumed to have continued to enjoy sound mental health. *Com. v. Wireback*, 190 Pa 138, 42 Atl 542.

Conversely, a person shown to have been insane will be presumed to have continued insane, in the absence of proof to the contrary. *Armstrong v. State*, 30 Fla 170, 11 So 618.

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The corporate existence of an institution will be presumed to have continued, in the absence of any facts indicating a contrary situation. *Yankton National Bank v. Benson*, *ibid*.

It has also been held that the nature and specific condition of a legal instrument, once shown to have existed, will be presumed to have continued to have followed such form. *Curtis v. Cutler*, 76 Fed 16, 37 LRA 737.

A contract of agency, for a stated purpose, is presumed to continue until that purpose is accomplished, unless facts showing a contrary situation are presented. *McGillicuddy v. Hartford*, 103 Me 224, 68 Atl 860.

The question as to the nature and quantum of proof required to overcome the presumption depends upon the facts in each case, and is ordinarily a question of fact for the jury to evaluate.

Thus, in the case of the presumption of the condition of insanity, it has been held that the testimony of the person's relatives and friends as to the character of his subsequent conduct, may be such as to overcome the presumption of insanity, depending upon the weight accorded such testimony by the jury. *Feild v. Koonce*, 178 Ark 862, 12 SW(2d) 772.

CONTRACT, OPINION AS TO PERFORMANCE

- Q—What is your occupation? A—Advertising counsellor, sales promoter, etc.
- Q—How long have you been engaged in this work? A—Fourteen years.
- Q—During that time have you had occasion to promote the sales of books and magazines?
- Q—About how many sales promotions have you handled in the field of books and magazines?
- Q—Have you had occasion to estimate the cost of such promotions?
- Q—To what extent did you supervise the campaigns?
- Q—Are you generally familiar with the expenses of such sales promotions?
- Q—In what areas or parts of the country did you perform this work?
- Q—Did you, on or about the 16th day of January, 1944, review the sales promotion of the magazine "Readers Review" for a certain period during 1943?
- Q—I show you plaintiff's exhibit A and ask if this is the sales promotion summary you refer to? A—Yes.
- Q—Are you generally familiar with the items of work enumerated upon this statement?
- Q—Assuming that a person undertook to promote the sales of a publication pursuant to an agreement that called for the following work: (enumerate in detail); would you say that the services performed on this exhibit would constitute a compliance with the contract?
-

A lay witness may not, ordinarily, in an action for breach of contract, render an opinion as to performance, or nonperformance, of the contract. *Standard Scale & Supply Co. v. Baltimore Enamel & Novelty Co.* 136 Md 278, 110 Atl 486; *Forsberg v. Zehm*, 150 Va 756, 143 SE 284.

Where the facts involved in the case are so voluminous and complicated as to make comprehension by the average person difficult, the court may in its discretion allow a properly qualified witness to express an opinion as to performance or

nonperformance. *John V. Schaefer & Co. v. Ely*, 84 Conn 501, 80 Atl 775.

Thus, where the issue involves construction of a complicated engineering job, as a bridge, expert testimony is admissible to explain what to the average mind may be unintelligible. Annotation: Ann Cas 1912D.

It has been pointed out in this connection that the presence in court of the expert witness, with the opportunity for cross-examination his presence affords, and the availability of the plans, designs or materials forming the basis for his judgment, assure a fair hearing and full opportunity for development of all the pertinent facts. *Hammaker v. Schleigh*, 157 Md 652, 147 Atl 790.

The rule allowing expert testimony as to performance has been allowed application in the instance of an advertising contract, calling for the services of a party in promoting the sale and distribution of a certain article. *Perry v. Jensen*, 142 Pa 125, 21 Atl 866. In this case, the court allowed an expert witness to state his opinion as to whether certain acts by way of promotion and advertising were sufficient compliance with a contract calling for specialized services in that connection.

CONVERSATIONS, PROOF OF

Q—Do you know Alfred Browning, the plaintiff in this action?

Q—Are you also acquainted with William Sachs, the defendant in this case?

Q—Do you recall visiting the Empire General Store in the company of both these parties on or about April 9th, 1944?

Q—Do you recall the exact date?

Q—What was the occasion for your visit to this store? A—I was there to help Browning and Sachs select a gasolene engine.

Q—Did you look at any engines while in the store? A—Yes.

Q—Did you hear any conversation between Sachs and Browning, relative to the purchase of an engine? A—Yes.

Q—Do you recall whether any part of this conversation related to whose funds were to be used for purchase of the machine? A—Yes, I do.

Q—Will you state so much of their conversation as relates to this matter.

Q—Now will you tell this court and jury whether you heard any conversation relative to the use to be put to this machine when purchased? A—Yes.

Q—Please state this conversation, as near as you can now recall.

(Where possible, the actual words should be used, otherwise the substance of the conversation may be stated by the witness.)

Q—During both of these conversations how far were you standing from the plaintiff and defendant?

Q—In what part of the store did these talks take place?

It is proper to ask a witness to state what he heard in the nature of a conversation between two parties, where the subject matter thereof is relevant and material to the issues in the case. Where the witness states a portion of the conversation, it is proper to ask him to give the remainder thereof, to the extent that it tends to explain the portion of the testimony already received. *Gibson v. State*, 91 Ala 64, 9 So 171; *Schwartz v. Wood*, 21 NY Supp 1053.

Similarly, it is held proper to state any subsequent conver-

sations which flow from, or tend to explain or clarify, the portion of conversation received in evidence. *Enos v. Owens* Slate Co. 104 Vt 329, 160 Atl 185.

The mere fact that a person states a conversation took place between two persons does not render admissible the substance thereof. *Providence Life & Accid. Ins. Co. v. Black*, 15 Ala App 437, 73 So 757. Nor does the fact that a witness accidentally discloses the nature of a conversation he overheard or took part in, make competent the contents thereof. *Uhe v. Chicago, M. & St. P. R. Co.* 3 SD 563, 54 NW 601.

It is proper for a witness to state that a conversation took place between two persons, and that a third person was within hearing thereof, but he cannot state as his opinion that such third person actually heard the contents of the conversation. *Foster v. Aubchon*, 221 SW 741 (Mo App).

In those instances where a witness does not remember the exact words or sentences used in a conversation, he may state the substance thereof, to the best of his recollection.

CONVICTION OR ACQUITTAL AS EVIDENCE

It is held by the weight of authority that a judgment of conviction rendered in a criminal prosecution is inadmissible in evidence in a purely civil proceeding, for the purpose of establishing the truth of the facts on which it is based. *Marceau v. Travelers Ins. Co.* 101 Cal 338, 35 Pac 856; *Metropolitan L. Ins. Co. v. Hand*, 25 Ga App 90, 102 SE 647; *Doyle v. Gore*, 15 Mont 212, 38 Pac 939; *Chernes v. Rosenwasser*, 181 App Div 837, 169 NY Supp 38.

A wide variety of reasons have been assigned for the exclusion of this type of evidence. The prevailing rule was stated in *Seaboard Air-Line R. Co. v. O'Quin*, 124 Ga 357, 52 SE 427, as follows:

"This rule rests upon the reasoning that the two proceedings are not, ordinarily, between the same parties; different rules as to the competency of witnesses and as to the weight of evidence exist; and the issue in the criminal proceeding is not necessarily the same, either as to scope or as to its attendant results, as that involved in the civil action. In this state, the defendant is not, in a criminal case, permitted to testify, and his version of the transaction may be believed or rejected in the discretion of the jury; while, on the other hand, the party against whom the civil action is brought should not be held bound by the result of the criminal proceeding, not being a party thereto and not having the right to examine or cross-examine witnesses, or to control the conduct of the case."

The most commonly assigned reason for the exclusion of proof of a conviction or acquittal in a civil proceeding, is the lack of mutuality; or the fact that the defendant in the civil action was not a party to the criminal proceeding, and is hence not bound by any verdict rendered therein. *Myers v. Maryland Casualty Co.* 123 Mo App 682, 101 SW 124; *Rosenberg v. Salvatore*, 16 NYSR 801, 1 NY Supp 326.

Thus, in *Corbley v. Wilson*, 71 Ill 209, 22 Am Rep 98, the court pointed out that it is an axiom of the law that "no man should be affected by proceedings to which he was a stranger—to which, if he is a party he must be bound. He must have been directly interested in the subject-matter of the proceedings, with the right to make defense, to adduce testimony, to cross-examine the witnesses on the opposite side, to control in some degree, the proceedings, and to appeal from the judg-

ment. Persons not having these rights are regarded as strangers to the cause. Privies are, of course, bound, as they are the representatives of the real parties. An exception to this rule is allowed in the case of verdicts and judgments upon subjects of a public nature, such as customs and the like; in most, or all of which cases, evidence of reputation is admissible, and also in cases of judgments in rem; and it is said a judgment, when used by way of inducement, or to establish a collateral fact, may be admitted, though the parties are not the same, as, producing the record of conviction in order to prove the legal infamy of a witness, or to prove what was known at a trial, and cases of this nature. The record in this case was of a character entirely different. It was a public prosecution in conducting which defendant had no agency or power, or rights, or interests at stake. It would be subversive of all justice to allow such testimony. What could be more efficacious toward a recovery by plaintiff than to show he had been indicted and tried for the crime, and acquitted? Does this bind the defendant and defeat his plea that the charge was true? So far as the defendant in the indictment and the people are concerned, that record can speak anywhere and everywhere, and its tones must be heeded. But on what principle is it that defendant should not be permitted to prove the charge, notwithstanding the verdict in the criminal trial? Though that is conclusive between the parties, it is not true as against the defendant. Verdicts of juries in criminal cases are not always responsive to the facts, though public policy demands they should be held, when followed by a judgment, as truth itself; but this only as to parties and privies, or in regard to some public matter, of which we have spoken."

This rule has been applied to proof of convictions offered for the purpose of showing the existence of criminal negligence in a specific case. Proof of a conviction under such circumstances was held inadmissible in *Fonville v. Atlanta*, etc. R. Co. 93 SC 287, 75 SE 172, the court ruling: "The general rule that the records in criminal cases are not admissible in civil cases as evidence of the facts upon which a conviction was had is well settled. There are some exceptions, but the general rule is as stated, and it is founded upon sound principles, to wit, the want of mutuality, arising out of the fact that the parties to the record are not the same, and the fact that

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the course of the proceedings and the rules of decision in the two courts are different. A higher degree of proof is required in criminal than in civil cases."

An application of this rule is also seen in the holding that the record of conviction of the defendant in a criminal proceeding of the charge of larceny of certain property, is inadmissible in a civil action to recover the value of the property stolen from the plaintiff, or to establish the fact that the defendant actually stole the property involved. *Interstate Dry Goods Stores v. Williamson*, 91 W Va 156, 112 SE 301.

The court pointed out in this case that if the judgment of conviction "had been rendered upon a plea of guilty, the record of that plea could be introduced not as conclusive evidence against the defendant, but as an admission upon his part. It would not differ from an extrajudicial admission of liability made by him, except that more importance might be attached to it because of the solemnity attaching to the surroundings under which it was made, and the deliberation attending the entering of such a plea. But in this case the defendant did not plead guilty. He pleaded not guilty and insisted that he was not guilty during the progress of the trial. It is uniformly held that a judgment of conviction or acquittal in a criminal case is not proper evidence in a civil case, to establish the facts which were necessary to be established in order to secure such conviction or acquittal. The parties to the criminal prosecution are different. The rules of evidence are different in the two classes of cases, and the purposes and objects sought to be accomplished are essentially different. In a criminal case, the defendant cannot be made to testify, and no inference can be drawn from the fact that he does not testify, while in a civil suit his adversary may use him as a witness if he desires. He may, however, in the criminal case, testify in his own behalf, and to allow the record of that judgment to be used as evidence in the civil suit would be giving effect to the defendant's testimony given upon the criminal trial. In a criminal case, the guilt of the accused must be proven beyond a reasonable doubt, while this is not the rule in civil trials. The criminal proceeding is between the state and the accused party, and seeks vindication of a public right, while in the civil suit the purpose sought is vindication of purely private rights and interests."

Similarly, it has been held that the record of acquittal in a criminal proceeding is inadmissible to show the innocence of the defendant in a subsequent civil action. *Chernes v. Rosenwasser*, 181 App Div 837, 169 NY Supp 38.

There is, however, some authority for the view that the record of conviction or acquittal in a criminal proceeding is competent evidence in a civil action as proof of the facts upon which it was based. *Bankston v. Folks*, 38 La Ann 267.

Thus, in *Maybee v. Avery*, 18 Johns.(NY)352, it was ruled that the record of conviction of the plaintiff for stealing certain personal property was admissible on the part of the defendant in a slander action based upon the charge of such theft.

The court held in this case that it is undoubtedly a rule that "to give a verdict and judgment thereon in evidence, it must be upon the same point and between the same parties or privies. The reason why it must be between the same parties is that otherwise a man would be bound by a decision in which he was not at liberty to cross-examine the witnesses; and generally the benefit of the rule is mutual; and one who is not a party to the cause, and would not be bound by the verdict, if against him, cannot avail himself of it. One of the exceptions to the rule is that where the matter in dispute is a question of public right, in that case, all persons standing in the same situation as the parties are affected by it. It appears to me that a verdict on an indictment forms another exception, and upon the same principle. The public is the party aggrieved, the prosecution is carried on through their functionaries, and any individual may, when necessary, avail himself of a conviction. The plaintiff cannot complain of this, for he had an opportunity to cross-examine the witnesses, to adduce his testimony, and to reverse the judgment if erroneous."

A well-recognized exception is in the case of a plea of guilty, upon the theory that such plea constitutes an admission of guilt. *Markett v. Gemke*, 154 NY Supp 780.

As stated in *Rudolph v. Landwerlen*, 92 Ind 34:

"Over the objection of the defendant, the plaintiff was permitted to introduce in evidence the record of a criminal prosecution of the defendant for the same assault and battery, and his conviction thereunder, upon his plea of guilty, before a justice of the peace. It is contended that this was error, because

he appellee was not a party to the action the record of which was so admitted in evidence; and appellant's counsel have cited authorities relating to the effect of judgments by way of estoppel. Unquestionably, this record could not operate as an estoppel, but no such effect was claimed for it. The court instructed the jury that this record should not be regarded in this case as conclusive upon the defendant, but only as an admission on his part of a material fact in issue in the case, and further instructed as to the character of the evidence as an admission. A plea of guilty must be presumed to have been made by the defendant in person, solemnly and without coercion, with opportunity to take advice of counsel. In a subsequent civil action involving the same subject matter, his plea is admissible against him, though it is not conclusive, but is subject, like other confessions, to be explained or controverted."

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